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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should overrule or expressly limit its decision in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1211, 20 L. Ed. 2d 138 (1968), which held that it was unconstitutional to offer a defendant a benefit to plead guilty and waive his right to a jury trial, in order to avoid a possible death sentence, in light of: (a) the significant changes in capital jurisprudence; (b) this Court's subsequent decisions, holding that plea agreements, even in capital cases, are constitutional and a desirable attribute of the criminal justice system; and (c) the New York Court of Appeals exclusive reliance on *Jackson* in striking N.Y. Crim. Proc. Law §§ 220.10(5)(e) and 220.30(3)(b)(vii), which empowered the prosecutor to offer a discretionary non-death penalty plea bargain to a capital defendant.

2. Whether the New York Court of Appeals correctly interpreted *United States v. Jackson* when it struck N.Y. Crim. Proc. Law §§ 220.10(5)(e) and 220.30(3)(b)(vii), which codified a prosecutor's right to negotiate and offer a capital defendant a plea bargain with a non-death sentence either before, during, or after a guilt phase trial, irrespective of whether the defendant chooses to exercise his Fifth and Sixth Amendment rights to a trial on the question of guilt.

LIST OF PARTIES

The Petitioners in this case are:

CHARLES J. HYNES, District Attorney of Kings County, State of New York

HOWARD R. RELIN, District Attorney of Monroe County, State of New York

ELIOT L. SPITZER, Attorney General of the State of New York

The Respondents in this case are:

ALBERT TOMEI, Justice of the Supreme Court of the State of New York, County of Kings

MICHAEL SHANE HALE

JOHN J. CONNELL, Judge of the County Court, Monroe County State of New York

ANGEL MATEO

These cases emanated from the criminal prosecutions of (a) Michael Shane Hale and (b) Angel Mateo, respectively, both of whom had been indicted on charges including first degree murder. In both cases, the District Attorney filed a notice of intent to seek the death penalty pursuant to N.Y. Crim. Proc. Law § 250.40(2). Both Hale and Mateo filed motions requesting that New York's capital punishment law be invalidated as unconstitutional. After Justice Tomei and Judge Connell, respectively, found that certain provisions of New York's Criminal Procedure Law relating to guilty pleas in capital cases were unconstitutional, District Attorney Hynes and District Attorney Relin brought proceedings in the Appellate Division of the Supreme Court of New York to declare the statutory provisions constitutional. Both the Appellate

Division, Second Department and the Appellate Division, Fourth Department, declared the provisions to be constitutional.

After Justice Tomei and Michael Shane Hale appealed to the New York Court of Appeals in the proceeding brought by District Attorney Hynes, and after Judge Connell and Angel Mateo appealed to the New York Court of Appeals in the proceeding brought by District Attorney Relin, the Court of Appeals consolidated the appeals and heard them together. The Attorney General of the State of New York sought and was granted permission to intervene in the matter.

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Charles J. Hynes, as District Attorney of the County of Kings, State of New York, Howard R. Relin, as District Attorney of the County of Monroe, State of New York, and Eliot L. Spitzer, the Attorney General of the State of New York, as intervenor, petition this Court for a writ of *certiorari* to review a decision and judgment of the Court of Appeals for the State of New York, dated December 22, 1998, which declared that provisions of New York State's Criminal Procedure Law regarding guilty pleas in first degree murder cases violated the Fifth and Sixth Amendments to the United States Constitution, because those provisions needlessly penalized the exercise of the right to a jury trial on the issue of guilt and needlessly encouraged the waiver of the right not to plead guilty.

OPINIONS BELOW

The opinion of the New York Court of Appeals in *Matter of Hynes v. Tomei* and *Matter of Relin v. Connell* is reported at 92 N.Y.2d 613 (1998) and is reprinted in the appendix at 1a. The opinion of the Appellate Division, Second Department in *Matter of Hynes v. Tomei* is reported at 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't 1997) and is reprinted in the appendix at page 20a. The opinion of the Appellate Division, Fourth Department in *Matter of Relin v. Connell* is reported at 674 N.Y.S.2d 192 (4th Dep't 1998) and is reprinted in the appendix at page 34a. The opinion of respondent Justice Albert Tomei in *People v. Hale* is reported at 173 Misc. 2d 140, 661 N.Y.S.2d 457 (N.Y. Sup. Ct., Kings Co. 1997), and the applicable portion thereof is reprinted in the appendix at page 37a. The applicable portion of unpublished opinion of respondent Judge John J. Connell in *People v. Mateo* is reprinted in the appendix at page 54a.

JURISDICTIONAL STATEMENT

The judgment of the New York Court of Appeals was entered on December 22, 1998. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

STATUTES INVOLVED

N.Y. Crim. Proc. Law § 220.10. *Plea; kinds of pleas.*

The only kinds of pleas which may be entered to an indictment are those specified in this section:

* * *

5. (e) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

N.Y. Crim. Proc. Law § 220.30. *Plea; plea of guilty to part of indictment; plea covering other indictments.*

> 3. (b)(vii) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

STATEMENT OF THE CASE

Proceedings with Respect to *Hynes v. Tomei*

A. The Criminal Proceeding - *People v. Michael Shane Hale*

On October 14, 1995, in the County of Kings, Borough of Brooklyn, City and State of New York, Michael Shane Hale, being more than eighteen years old, robbed, kidnapped and murdered sixty-four-year-old Stefan Tanner, dismembering his body.

On July 9, 1996, Hale was charged, in Kings County Indictment Number 8776/96, with, *inter alia*, three counts of Murder in the First Degree (N.Y. Penal Law § 125.27[1][a][vii] [McKinney 1998]). On September 24, 1996, the People of the State of New York filed notice, pursuant to N.Y. Crim. Proc. Law § 250.40(2) (McKinney Supp. 1999), of their intention to seek the death penalty (N.Y. Crim. Proc. Law § 400.27 [McKinney Supp. 1999]) in the event Hale was convicted of first degree murder.

B. Pretrial Motions

On January 21, 1997, Hale's attorneys sought an order declaring N.Y. Crim. Proc. Law §§ 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) (McKinney Supp. 1999), unconstitutional, and

striking the capital punishment provisions pursuant to *United States v. Jackson*. The People of the State of New York filed papers and memoranda of law in opposition to Hale's motions on March 10, 1997.

C. The Decision of Respondent Justice Albert Tomei

On June 6, 1997, in a portion of a decision and order disposing of Hale's motions, respondent Justice Tomei determined that the aforementioned Criminal Procedure Law provisions violated the Fifth and Sixth Amendments to the United States Constitution, based on *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). Justice Tomei determined that the invalidated provisions were severable from the remainder of New York's capital punishment law (*see* 1995 N.Y. Laws, § 1), and thus, declined to hold the entire capital punishment law unconstitutional. *People v. Hale*, 173 Misc. 2d 140, 177-87, 661 N.Y.S.2d 457, 478-84 (N.Y. Sup. Ct., Kings Co. 1997). (37a-53a).

Accordingly, Justice Tomei refused to accept a guilty plea negotiated by the People and Hale unless the People unconditionally and irrevocably withdrew their notice of intent to seek the death penalty, even though the agreement only required Hale to plead to second degree murder, and not first degree murder.[1]

D. The State Declaratory Judgment Action

On August 5, 1997, petitioner Charles J. Hynes, as District Attorney of Kings County, State of New York, moved in the Appellate Division, Second Department, for a writ of prohibition enjoining Justice Tomei from enforcing that portion of the June 6, 1997 order, adhered to upon reargument on July 23, 1997, which declared the capital guilty plea provisions unconstitutional. In the alternative, District Attorney Hynes moved for a declaratory judgment, pursuant to N.Y. Civ. Prac. L. & R. Article 30 (McKinney 1991), declaring the capital guilty plea provisions constitutional.

---

1. N.Y. Crim. Proc. Law § 250.40(4) (McKinney Supp. 1999) provides that once a notice of intent to seek the death penalty is withdrawn, it cannot be refiled.

In a decision and judgment dated December 22, 1997, the Appellate Division, Second Department converted the proceeding, entitled *Matter of Hynes v. Tomei*, into a declaratory judgment action, and unanimously adjudged the capital guilty plea provisions to be constitutional and valid. *Matter of Hynes v. Tomei*, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't 1997) (20a-33a). That court found that the statute at issue in *United States v. Jackson* was distinguishable from the New York statutory provisions in two crucial respects. First, the defendant in *Jackson* faced a unitary trial. Electing to assert the right to a trial on the question of guilt automatically placed the question of death before the jury. The jury could recommend a death sentence without balancing aggravating and mitigating factors. New York's law, by contrast, provided for a bifurcated trial, including a separate sentencing phase at which the jury was required to balance such factors.

Second, the defendant in *Jackson* had complete control of the plea process; he could plead guilty as of right to the charge under the former Federal Kidnapping Act and avoid the death penalty by his unilateral action. The New York statutory provisions did not give capital defendants control over the process. The provisions merely permitted the prosecution to negotiate and enter into a plea agreement with a capital defendant, thereby removing the case from the capital punishment track. *Matter of Hynes v. Tomei*, 237 A.D.2d at 57-58, 666 N.Y.S.2d at 690-91 (27a-30a).

On February 10 and 11, 1998, respondents Justice Tomei and Michael Shane Hale moved respectively for leave to appeal the judgment of the Appellate Division, Second Department, to the New York Court Appeals, and also appealed as of right, on constitutional grounds. On April 7, 1998, the Court of Appeals directed the parties to perfect their appeals taken as of right.

Proceedings with Respect to *Relin v. Connell*

E. The Criminal Proceeding – *People v. Angel Mateo*

On November 2, 1996, in the City of Rochester, County of Monroe, State of New York, Angel Mateo, being more than

eighteen years old, kidnapped and killed Juan Rodriguez-Matos. On December 19, 1996, Mateo was indicted, *inter alia*, on charges of Murder in the First Degree (N.Y. Penal Law § 125.27[1][a][vii] [McKinney 1998]). On January 17, 1997, the People of the State of New York filed notice, pursuant to N.Y. Crim. Proc. Law § 250.40(2) (McKinney Supp. 1999), of their intention to seek the death penalty (N.Y. Crim. Proc. Law § 400.27 [McKinney Supp. 1999]) in the event Mateo was convicted of first degree murder.

F. Pretrial Motions

Mateo's attorneys filed a series of motions which, *inter alia*, sought an order similar to that sought by respondent Hale, declaring N.Y. Crim. Proc. Law §§ 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) (McKinney Supp. 1999) unconstitutional. The People of the State of New York filed papers and memoranda of law in opposition to Mateo's motions.

G. The Decision of Respondent Judge John J. Connell

On August 25, 1997, Judge John J. Connell filed a decision and order disposing of Mateo's motions. *See People v. Mateo*, 175 Misc. 2d 192, 664 N.Y.S.2d 981 (N.Y. Co. Ct., Monroe County 1997). An unpublished portion of that decision and order included a determination that the aforementioned Criminal Procedure Law provisions were unconstitutional based on *United States v. Jackson*. Judge Connell reasoned, in part, that plea bargaining in capital cases was inherently unbalanced and, therefore, unconstitutional. Judge Connell determined that the invalidated provisions were severable from the remainder of New York's capital punishment law (*see* 1995 N.Y. Laws, § 1). *See People v. Mateo*, Ind. No. 0914/96, N.Y. Co. Ct., Monroe County, Aug. 25, 1997 (54a-57a).

H. The State Declaratory Judgment Action

On December 24, 1997, petitioner Howard R. Relin, as District Attorney of Monroe County, State of New York, moved in the Appellate Division, Fourth Department, for a writ of prohibition enjoining Judge Connell from enforcing that portion of the August 25, 1997 order which declared the capital guilty plea provisions unconstitutional. In the alternative, District Attorney Relin moved for a declaratory judgment, pursuant to N.Y. Civ. Prac. L. & R. Article 30 (McKinney 1991), declaring the capital guilty plea provisions constitutional.

In a decision and judgment dated June 10, 1998, the Appellate Division, Fourth Department, converted the proceeding, entitled *Matter of Relin v. Connell*, into a declaratory judgment action, and unanimously adjudged the capital guilty plea provisions to be constitutional. *Matter of Relin v. Connell*, __ A.D.2d __, 674 N.Y.S.2d 192 (4th Dep't 1998) (34a-36a). The court determined that the challenged provisions did not needlessly encourage guilty pleas in capital cases because they did not afford capital defendants the unilateral right to plead guilty and thereby avoid the death penalty. __ A.D.2d __, __, 674 N.Y.S.2d at 193 (36a).

On July 7, 10 and 13, 1998, respondents Judge Connell and Angel Mateo moved for leave to appeal the judgment of the Appellate Division, Fourth Department, to the New York Court of Appeals, and also appealed as of right. On August 31, 1998, the Court of Appeals directed the parties to perfect their appeals taken as of right.

The Court of Appeals consolidated the appeals in *Matter of Hynes v. Tomei* and *Matter of Relin v. Connell*. The Attorney General of the State of New York sought and was granted permission to intervene as of right pursuant to N.Y. Executive Law § 71 (McKinney 1993).

I. The Decision of the New York Court of Appeals

The New York Court of Appeals unanimously reversed the judgments of both the Appellate Division, Second Department and the Appellate Division, Fourth Department, and determined that two of the capital guilty plea provisions at issue violated the Fifth and Sixth Amendments of the United States Constitution. *Matter of Hynes v. Tomei*, 92 N.Y.2d 613, __ N.E.2d __, __ N.Y.S.2d __ (1998) (1a-19a).

The Court of Appeals noted that the New York capital punishment statute was distinguishable from the Federal Kidnaping Act at issue in *Jackson*: first, in *Jackson*, a capital defendant had unilateral control over the plea process. The New York capital guilty plea provisions, by contrast, only authorized negotiated bilateral pleas. 92 N.Y.2d at 623-25 (8a-12a). Second, New York's capital statute required a bifurcated trial procedure, by which a jury determined the appropriate sentence in a separate proceeding (*see* N.Y. Crim. Proc. Law § 400.27 [McKinney Supp. 1999]); the defendant in *Jackson* faced a unitary trial. A defendant charged under the statute at issue in *Jackson* automatically placed the issue of capital punishment before the jury by asserting his or her Fifth and Sixth Amendment rights to trial. The Court of Appeals acknowledged that under the bifurcated scheme, a capital defendant could negotiate a plea to a sentence of less than death, even after he or she had been found guilty of first degree murder at a jury trial — after having exercised the Fifth Amendment right not to plead guilty and the Sixth Amendment right to a jury trial on the question of guilt. 92 N.Y.2d at 625-26 (12a-13a).

The Court of Appeals determined, nonetheless, that even in the face of these distinguishing characteristics, the statutory provisions provided for the possibility of a death sentence only after a jury trial, in contravention of the *Jackson* precedent (13a). On this basis, the court held the plea provisions unconstitutional. 92 N.Y.2d at 626. (13a-14a). The Court severed the capital guilty plea provisions from the statute. 92 N.Y.2d at 627-28 (14a-17a).

The Court of Appeals realized that this Court might decide the issue differently, and that the result of its determination would be to "reduce the flexibility of both prosecutors and defendants who wish to plea bargain in capital cases." 92 N.Y.2d at 629 (17a-18a). "[O]ur reversal in these cases may well have an ironic twist in that capital defendants will have fewer opportunities to avoid the possibility of the death penalty." *Id.* (18a). Noting that this Court might wish to reexamine *Jackson's* interpretation of the constitution, the Court of Appeals stated that it was bound by controlling Supreme Court precedent, and that *Jackson* compelled the invalidation of the capital guilty plea provisions. *Id.* (18a).

Finally, the Court of Appeals determined that *Jackson* did not prevent pleas to crimes such as second degree murder, which are not punishable by death, even where a notice of intent to seek the death penalty is pending. *Id.* at 629-30. (18a-19a).

J. Ancillary and Subsequent Proceedings

On December 3, 1998, during the pendency of this case in the New York Court of Appeals, Angel Mateo was found guilty of first degree murder. After a sentencing proceeding, the jury, on December 16, 1998, sentenced Mateo to death. On February 11, 1999, respondent Mateo filed a notice of appeal from the judgment and sentence.

On January 11, 1999, after the decision of the Court of Appeals in *Matter of Hynes v. Tomei*, respondent Hale pleaded guilty to the crimes of Murder in the Second Degree (N.Y. Penal Law § 125.25[2] [McKinney 1998]), and other lesser counts, in exchange for a sentence of fifty years to life. The People's notice of intent to seek the death penalty was not withdrawn. On March 5, 1999, respondent Hale filed a notice of appeal from the judgment of conviction and sentence.

REASONS FOR GRANTING THE WRIT

Because this Court has not revisited the issues underlying *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) since the marked evolution of negotiated plea jurisprudence and capital jurisprudence, with separate guilt and penalty proceedings, a patchwork of inconsistent, irreconcilable and illogical case law has developed, raising questions of great constitutional importance which need to be and can only be resolved by this Court: (1) should *Jackson* be overruled or expressly limited; and (2) if not, is the holding in *Jackson* applicable to bifurcated capital statutes, a question left open by this Court in *Jackson*, or, alternatively, did the New York Court of Appeals misinterpret the scope of the *Jackson* holding and its underlying rationale.

In *Matter of Hynes v. Tomei*, 92 N.Y.2d 613 (1998), the New York Court of Appeals held that unless the plea provisions of a capital statute enable a defendant to plead guilty and obtain a sentence of death, the plea provisions which permit prosecutors to engage in plea negotiations and obtain bargained-for plea agreements to first-degree murder with sentences of life imprisonment without parole or another term of imprisonment are unconstitutional.

The lone justification for this seemingly illogical and unwise result was this Court's decision, 30 years ago, in *United States v. Jackson*. In reaching its decision, the New York Court of Appeals implicitly invited this Court to reconsider and review the *Jackson* issue:

> The Supreme Court has not revisited *Jackson* or its progeny in 20 years and these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment.

Matter of Hynes v. Tomei, 92 N.Y.2d at 629. The New York Court of Appeals, however, noted that while this Court may revisit its

interpretation of *Jackson*, the New York Court of Appeals was bound by its own interpretation of that case. *Id.*

Because the issues raised are strictly those of fundamental federal constitutional law, upon which numerous state and federal courts have issued inconsistent opinions, with impractical and incongruous results, this Court should grant the petition for a writ of certiorari.

I.

UNITED STATES v. JACKSON SHOULD BE OVERRULED OR EXPRESSLY LIMITED

In its decision, the New York Court of Appeals observed that a number of events that have transpired since *Jackson* was decided: "the passage of three decades, a plethora of decisions involving the death penalty, and a sea change in plea bargaining . . ." *Matter of Hynes v. Tomei*, 92 N.Y.2d at 620. This observation is accurate, and recognizes an inescapable fact: while *Jackson* has not been formally overruled, and thus the court felt compelled to follow it, it has nevertheless ceased to be a viable precedent. Indeed, the holding of *Jackson* is fundamentally irreconcilable with this Court's post-*Jackson* decisions which have firmly established the propriety of discretionary plea negotiations with capital defendants, and have created a modern capital jurisprudence profoundly different from the state of the law at the time of *Jackson*. Appropriately, courts in other states which have considered the issue have concluded that *Jackson* is obsolete. Accordingly, this Court should grant *certiorari* because *Jackson* should be formally overruled or expressly limited.

As set forth in *Jackson*, the Federal Kidnapping Act (18 U.S.C. § 1201[a], also referred to as "The Lindbergh Law") provided the defendant with a right to enter a plea of guilty; the statute further provided that a defendant who elected a jury trial and was convicted, automatically faced and could receive the death penalty if the jury so recommended; a defendant who elected to plead

guilty or to be tried by the court without a jury could not receive such a penalty. 390 U.S. at 570-71, 88 S. Ct at 1210. The statute was held unconstitutional because

> [t]he inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.

Id., 390 U.S. at 581, 88 S. Ct. at 1216 (note omitted).

Thus, the Court in *Jackson* indicated that it was constitutionally impermissible to offer a capital defendant a reduced sentence in exchange for his or her guilty plea, because the "inevitable" result would be to discourage that defendant from exercising the constitutional right to trial and to remain silent. That proposition is fundamentally inconsistent with the concept of plea negotiation.

At the time *Jackson* was decided in 1968, the disposition of cases by negotiated plea bargains, though legitimate, was nevertheless a hidden component of the criminal justice system. *Jackson* had placed the role of plea bargaining in dire question. Pursuant to that decision, it was constitutionally impermissible to allow a defendant convicted after trial to receive the death penalty, while providing that a defendant who pleaded guilty received a life sentence instead. 390 U.S. at 581-83, 88 S. Ct. at 1216-17.

In *Jackson*, this Court stated that the "evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them." 390 U.S. at 583, 88 S. Ct. at 1217. Thus, it was impermissible for any provision of law to "discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.*, 390 U.S. at 581, 88 S. Ct. at 1216. Such a proposition cannot be maintained along with the principle that plea bargaining is a proper attribute of the criminal justice system, and, indeed, this Court's post-*Jackson* decisions demonstrate that the two are irreconcilable.

Shortly after *Jackson*, this Court openly recognized the positive attributes of plea bargaining. Properly-administered plea bargaining is to be "encouraged" as an "essential" and "desirable" "component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260-61, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427 (1971). This Court's "open acknowledgement of this previously clandestine practice" of plea bargaining is a fundamental change from *Jackson*. *Bordenkircher v. Hayes*, 434 U.S. 357, 361-62, 98 S. Ct. 663, 667, 54 L. Ed. 2d 604 (1978).

Indeed, five years after deciding *Jackson*, this Court made a dramatic change away from the position that any statutory format which "discouraged" the exercise of one's trial rights was unconstitutional. In *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), the Court recognized that if a plea bargain is to be accepted by a defendant, it must include something more favorable to the defendant than would be available had he gone to trial. Such an offer must, by its very nature, serve to discourage the defendant from going forward with a trial. *Chaffin* held that such an outcome did not offend the constitution; the constitution does not forbid a situation whereby a defendant is confronted with the "certainty or probability" that, if he goes to trial, he will receive a greater sentence than if he pleaded guilty. In stark contrast to *Jackson*, the *Chaffin* Court concluded that while every such circumstance has a "discouraging effect" on the defendant's assertion of his trial rights, the imposition of these "difficult choices" is an inherent attribute of the process by which plea bargains are tolerated and encouraged. *Chaffin*, 412 U.S. at 30-31, 93 S. Ct. at 1985.

Furthermore, this fundamental shift away from *Jackson* was not an isolated decision. In *Bordenkircher*, the Court held yet again that confronting a defendant with the risk of a more severe punishment should he proceed to trial instead of pleading guilty "may have a 'discouraging effect on the defendant's assertion of his trial rights,' " but such a result is a natural consequence of plea bargaining, and is constitutionally permissible. *Bordenkircher*, 434 U.S. at 364, 98 S. Ct. at 668, citing *Chaffin v. Stynchcombe*, 412 U.S. at 31, 93 S. Ct. at 1985.

In *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978), the Court once again adopted a position in favor of plea bargaining that was utterly irreconcilable with *Jackson*. The *Corbitt* Court considered the relationship of the two relevant concepts: the offering of favorable sentencing terms as an inducement to a guilty plea (which means, of course, the defendant is exposed to a higher sentence if convicted after trial), and the resulting disincentive for a defendant to exercise his right to a jury trial. The Court then reaffirmed the principles set forth in *Chaffin* and *Bordenkircher*:

> While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable — and permissible — attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

439 U.S. at 220-21, 99 S. Ct. at 498 (citation, quotation marks, and brackets omitted). Thus, in a series of three post-*Jackson* cases, this Court abandoned the notion expressed in *Jackson* that, because a guilty plea structure might have the inherent result of encouraging a guilty plea and discouraging a defendant from going to trial, it was unconstitutional. *See Corbitt*, 439 U.S. at 219, n.9, 99 S. Ct. at 497-98, n. 9.

In *Corbitt*, the Court provided additional proof that *Jackson* had been rejected. In *Jackson*, the challenged statute was criticized because it provided that the defendant who abandoned the right to contest his guilt before a jury and pleaded guilty was assured that he could not be executed, whereas the defendant who exercised his right to a trial suffered the risk of death. 390 U.S. at 581,

88 S. Ct. at 1216. In *Corbitt*, the Court applied an analysis that was diametrically opposed to that in *Jackson*:

> There is no doubt that those homicide defendants who are willing to plead non vult may be treated more leniently than those who go to trial, but withholding the possibility of lenience from the latter cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed.

Corbitt, 439 U.S. at 223, 99 S. Ct. at 500.

> The criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

439 U.S. at 221, 99 S. Ct. at 498. Furthermore, notwithstanding *Jackson's* language that the disparity of punishment available for a guilty plea and a trial conviction resulted in the needless encouragement of guilty pleas, 390 U.S. at 583, 88 S. Ct. at 1217, *Corbitt* rejected unequivocally any such claim. The Court noted that, just as a prosecutor can charge a defendant with the maximum level of offense and secure a conviction, despite the prosecutor's power to offer a reduced plea, the legislature may also "openly provide for the possibility of leniency in return for a plea." *Corbitt*, 439 U.S. at 224, 99 S. Ct. at 500. The challenged New York statutes do exactly that: they are a legislatively-authorized "leniency in return for a plea."

Corbitt rejected an additional prime component of *Jackson*. While the availability of a guilty plea and reduced disposition to avoid the maximum sentence troubled the Court in *Jackson*, 390 U.S. at 581, 88 S. Ct. at 1216, in *Corbitt*, the Court reached a fundamentally different — and irreconcilable — result. The Court

expressly rejected the viewpoint, represented by the dissent, which "appears to question any system that subjects the defendant who stands trial to a substantial risk of greater punishment than the defendant who pleads guilty." *Corbitt*, 439 U.S. at 224, 99 S. Ct. at 500. In so doing, the Court affirmed the post-*Jackson* principle that the defendant who declines to take advantage of a guilty plea with a reduced sentence and is instead convicted after trial, is not penalized for exercising his or her right to a jury trial, as the defendant was offered a free choice of proceeding to trial or pleading guilty. "Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision." *Id.*, 439 U.S. at 226, 99 S. Ct. at 501.

Thus, the decisions of this Court which followed *Jackson* turned away from its anti-plea bargaining holding, and accepted that plea bargaining is a fundamental component of criminal law. The Court recognized that a plea bargaining system requires the offering of dispositions more favorable than those available should the defendant be convicted after trial. Because the later cases such as *Chaffin*, *Bordenkircher*, and *Corbitt* cannot be reconciled with *Jackson*, the petition for *certiorari* should be granted, and *Jackson* should be overruled, or expressly limited.

II.

EVEN IF *JACKSON* IS NOT OVERRULED, CERTIORARI SHOULD BE GRANTED TO ADDRESS THE QUESTION EXPRESSLY LEFT OPEN IN *JACKSON*: IS *JACKSON* APPLICABLE TO MODERN CAPITAL STATUTES

In *Jackson*, this Court expressly left open the following question: whether a bifurcated capital statute, under which a capital defendant may exercise his or her right to a jury trial on the issue of guilt and still negotiate a plea if convicted, avoids the *Jackson* problem. *Jackson*, 390 U.S. at 573, 578-81, 88 S. Ct. at 1211, 1214-16. Since the *Jackson* ruling, plea jurisprudence and capital jurisprudence have undergone sweeping changes. Plea bargaining, including in capital cases, has become accepted. It is recognized

as an essential tool for the administration of criminal justice. In return for an admission of guilt, a defendant receives a lesser sentence and the proceedings are terminated. In similar fashion, bifurcated capital proceedings, with separate trials, separate evidentiary rules and separate instructions for the determination of guilt and penalty, have become the norm. These constitutional developments, however, collide with both the principles and holding of *Jackson*. Only this Court can resolve the important federal constitutional issues raised which reach core provisions of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The *Jackson* statute contained two critical provisions: (1) a defendant had the unilateral right to plead guilty. By electing this option the defendant automatically avoided the death penalty; and (2) a defendant who elected to exercise his Fifth and Sixth Amendment rights to a trial on the issue of guilt automatically placed the issue of capital punishment before the jury. The proceeding was unitary. There were no separate sentencing trials, no provision for consideration of mitigating and aggravating factors and no instructions to the jury on how to weigh these factors and arrive at a sentencing determination. Thus, a *Jackson* defendant could not elect to proceed with a jury trial on the issue of guilt, yet leave open the possibility of negotiating a sentence less than death. The defendant would live only if the jury voted to spare his life. *Jackson*, 390 U.S. at 581, 88 S. Ct. at 1216. The Court in *Jackson* found that these provisions needlessly encouraged defendants to waive their right not to plead guilty and to elect a jury trial in order to avoid a potential death penalty. *Id.*, 390 U.S. at 581-83, 88 S. Ct. at 1216-17.

Three possible solutions to the problem, short of the draconian remedy of abolishing pleas in capital cases, emerge: (1) create a bifurcated statute allowing for the same latitude in plea agreements either before or after trial on the issue of guilt. Because the defendant has the same right to negotiate a plea either before or after exercising his Fifth Amendment right not to plead guilty and his Sixth Amendment right to a trial on the issue of guilt, the defendant is, seemingly, not needlessly encouraged to waive these

rights nor penalized for exercising them; (2) do not grant defendants the unilateral right to plead guilty in capital cases with a non-death sentence. Only allow pleas pursuant to a negotiated agreement with the prosecution, which may be reached either before or after trial on the issue of guilt. Because a defendant has no automatic right to obtain a non-death sentence by pleading guilty and may obtain a negotiated plea regardless of whether he exercises his Fifth and Sixth Amendment guilt-phase trial rights, *Jackson* concerns should be satisfied; (3) provide for defendants the right to plead guilty and receive a death sentence, as well as a non-death sentence.

The New York statutes adopted two of these measures. New York created a bifurcated proceeding, allowing prosecutors to negotiate pleas in exchange for a non-death sentence regardless of whether the defendant exercised his constitutional rights not to plead guilty and to go to trial on the issue of guilt.[2] New York also denied defendants the unilateral right to plead guilty in a capital case and avoid death. At the same time, in keeping with the New York State constitutional mandate (N.Y. Const., Art. I, § 2), the statute required a jury trial in all capital cases in which a negotiated plea for leniency could not be reached. Two panels of the Appellate Division for the Supreme Court of New York felt that these measures satisfied *Jackson's* concerns. *Matter of Hynes v. Tomei*, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't 1997); *Matter of Relin v. Connell*, __ A.D.2d __, 674 N.Y.S.2d 192 (4th Dep't 1998). The Court of Appeals disagreed.

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2. In October 1998, a post-conviction plea agreement occurred. In *People v. Jermaine Page*, Kings County Indictment Number 9833/96, a capital prosecution, the defendant was convicted at the guilt-phase trial of first-degree murder. Prior to the commencement of the penalty-phase proceeding under New York's bifurcated capital system (*see* N.Y. Crim. Proc. Law § 400.27), the defendant agreed to waive the sentencing proceeding and accept a sentence of life imprisonment without the possibility of parole; the People consented to this disposition, by which they agreed to forego the death penalty and accepted a sentence of life imprisonment without parole.

Distilled to its essence, the New York Court of Appeals ruled that absent a provision granting a defendant the right to a "suicide" plea, it is unconstitutional for a capital statute to vest prosecutors with the discretion to negotiate a plea of guilty in exchange for leniency. *Compare Gregg v. Georgia*, 428 U.S. 153, 199, n. 50, 96 S. Ct. 2909, 2937, n. 50, 49 L. Ed. 2d 859 (1976) (prosecutor has "unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them"); *Corbitt*, 439 U.S. at 223, 99 S. Ct. at 499 ("providing the opportunity for lesser punishment . . . could not be deemed a needless or arbitrary burden on the defendant's constitutional rights within the meaning of *United States v. Jackson*").

Having so ruled, the New York Court of Appeals, nonetheless, announced in the next breath that it would be proper for the defendant in a capital case to plead guilty to second-degree murder, a count which does not even expose a defendant to a potential death penalty. *Matter of Hynes v. Tomei*, 92 N.Y.2d at 629 (*Jackson* does not "prevent a defendant from pleading guilty to another offense not punishable by death"). Somehow, the court reasoned, it is unconstitutionally coercive and a needless penalty on a defendant's right to a jury trial to offer him a non-death plea to first-degree murder, but a plea with the very same sentence is constitutionally sound if it is to second-degree murder. Indeed, the irrationality of this position is amplified by examining a triple-homicide case. If the defendant intentionally murdered three people, pursuant to the New York Court of Appeals' ruling, a prosecutor could constitutionally offer that defendant a plea of three consecutive counts of second-degree murder (one for each person killed), a total of seventy-five years to life imprisonment. However, it would be unconstitutionally coercive for the prosecutor to offer twenty-five years to life on each of three counts of first-degree murder (multiple murder counts which would include all three murders in each), which might as a matter of law, run concurrently. (*See* N.Y. Penal Law §§ 70.00[2][a], [3][a][i], 70.25[2], 125.25, 125.27[1][a][viii]).

Indeed, the New York Court of Appeals' ruling holds that it is constitutional for a prosecutor to promise to file a notice of intent

to seek the death penalty unless the defendant pleads guilty to first degree murder and accepts life without parole, but it is impermissible for the prosecutor to file the notice first and then make the same plea offer of life imprisonment without parole. Such distinctions without difference, and inexplicably incongruous results, cannot be what *Jackson* sought to promote.

III.

THE VARIOUS STATE AND FEDERAL COURTS THAT HAVE WRESTLED WITH *JACKSON* AND ITS APPLICATION TO MODERN CAPITAL STATUTES HAVE PRODUCED STARKLY CONFLICTING DECISIONS WHICH CANNOT BE HARMONIZED

The conflict between *Jackson* and this Court's post-*Jackson* cases has led to serious confusion and inconsistent results throughout the country. For example, while the New York Court of Appeals found *Jackson* to be viable, and applied it so as to strike a statutory format that provided for prosecutorial discretion in a capital case, and thereby prohibited guilty pleas to first-degree murder in capital cases, the highest courts in Arkansas and Nevada have reached entirely different results. Indeed, in *State v. Jett*, 419 So.2d 844, 852 (La. 1982), the Louisiana Supreme Court held that a statute just like New York's — which permitted guilty pleas only to sentences less than death and provided for death only after trial — to be constitutional.

Courts in Arkansas and Nevada have both noted the diminished significance of *Jackson*. *See Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982) (no *Jackson* violation where statute provides that capital defendant could be sentenced to death following a jury trial, but prosecutor, with permission of court, may waive death penalty and defendant could enter a negotiated plea to non-death sentence; "the holding in *Jackson* has been eroded in recent decisions")[3]; *Baker*

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3. The reasoning in *Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, has been upheld by federal courts against a number of *Jackson*-based

(Cont'd)

v. State, 310 Ark. 223, 225, 884 S.W.2d 603, 604 (1994) (Arkansas Supreme Court again stated that "the *Jackson* decision has been eroded" and cited this Court's decision in *Corbitt v. New Jersey*); *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648, 654 (1983), *cert. denied*, 465 U.S. 1051, 104 S. Ct. 1331, 79 L. Ed. 2d 726 (1984) ("There is no right to plead guilty, and the fact that only a jury may impose the death penalty does not invalidate [the statute]"); *Conger v. Warden*, 89 Nev. 263, 264, n. 1, 510 P.2d 1359, 1361, n. 1 (1973) ("*United States v. Jackson* appears to have been limited by later decisions"; no *Jackson* violation even though the only mechanism by which defendant can avoid death with certainty is by negotiated plea with prosecutor. "A guilty plea is not compelled and invalid under the Fifth Amendment simply because it is motivated by the defendant's desire to accept the certainty or probability of a lesser penalty than to face a wider range of possibilities extending from acquittal to conviction and a higher penalty"). As these courts have recognized, a defendant who pleads guilty provides a substantial benefit to the criminal justice system, and, in return, the state is entitled to extend a less harsh sentence to the defendant; however, when a plea is rejected, the state may prosecute the defendant to the fullest extent of the law, thereby seeking the most severe punishment provided by the law. *Id. See State v. Mann*, 1996 Tenn. Crim. App. LEXIS 508, 87-90 (Tenn. Crim. App. 1996), *aff'd*, 959 S.W.2d 503, 509-11 (Tenn. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 2376, 141 L. Ed. 2d 2376 (1998). To hold that a state can pursue no greater charge or seek no greater punishment than that offered during plea negotiations could effectively abolish the practice of plea bargaining in first degree murder cases.

(Cont'd)

challenges. *See Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), *aff'd and remanded*, 65 F.3d 676 (8th Cir. 1995) (relying on *Ruiz & Denton v. State*); *Hill v. Lockhart*, 824 F. Supp. 1327 (E.D. Ark. 1993), *aff'd in part and rev'd in part on other grounds*, 28 F.3d 832 (8th Cir. 1994) (same); *Pickens v. Lockhart*, 542 F. Supp. 585, 613 (E.D. Ark. 1982), *remanded*, 714 F.2d 1455 (8th Cir. 1983) ("We adopt the reasoning of the Arkansas Court [in *Ruiz*] that *United States v. Jackson*, on which petitioner relies is distinguishable").

The New York Court of Appeals' attempt to distinguish *Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, illustrates the strained and sophistic arguments that continued reliance upon *Jackson* requires. According to the New York court, Arkansas avoids the "*Jackson* problem" because the court, not the jury, made the final determination of whether or not to impose the death penalty, "and because guilty pleas were permitted only after the prosecutor waived the death penalty [citation omitted]." *Matter of Hynes v. Tomei*, 92 N.Y.2d at 627. This analysis does not bear scrutiny. If the constitutional defect turns on the fact that a more lenient penalty is available upon a guilty plea than under a trial conviction, it cannot matter which entity actually imposes the harsher trial penalty, the court or the jury. Relying upon the trial judge to make a final determination as to sentence cannot be a factor of constitutional significance. Indeed, in *Jackson*, the government had argued that federal trial judges could be relied upon to reject coerced pleas of guilty, and involuntary waivers of trial, thereby curing the defect. This Court soundly rejected that proposition as a remedy. *Jackson*, 390 U.S. at 583, 88 S. Ct. at 1217.

Equally untenable is the New York Court of Appeals' conclusory statement that the prosecutor's waiver of the death penalty preceding the plea somehow rectified the *Jackson* problem. All this provision does is provide for a system by which, in a capital case, the prosecution would, instead of seeking the death penalty, consent to a non-death disposition in return for the defendant's guilty plea. This is precisely the statutory scheme provided for in N.Y. Crim. Proc. Law §§ 220.10(5)(e) and 220.30(3)(b)(vii). Thus, the attempts by the New York Court of Appeals to distinguish the New York statutory provisions from like statutes that have survived *Jackson* challenges are simply wrong.

The New York Court of Appeals is not the only state court to erroneously conclude that *Jackson* forbids the granting of a discretionary benefit to the capital defendant who pleads guilty. In *State v. Johnson*, 134 N.H. 570, 575, 595 A.2d 498, 502 (1991),

cited by the New York Court of Appeals (*Matter of Hynes v. Tomei*, 92 N.Y.2d at 625, n. 5), the Supreme Court of New Hampshire, in response to a *Jackson* challenge to that state's capital statute, found that

> where, pursuant to statutory procedure, the death penalty is imposed upon conviction following a plea of not guilty and a trial, but is not imposed when there is a plea of guilty, that statute is unconstitutional [citation omitted].

See also Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984); *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981) (statute which provided for death penalty upon trial conviction but not upon guilty plea violated *Jackson*). Thus, states have analyzed similar capital statutes — which provide for discretionary guilty pleas to non-death sentences as the sole way in which an accused can be assured of avoiding the risk of the death penalty — pursuant to *Jackson* challenges, and reached completely opposite results. Such inconsistent and disparate results regarding fundamental questions of capital jurisprudence should not be left unaddressed by this Court.

CONCLUSION

For the reasons stated above, this Court should grant the writ of certiorari to review the decision and judgment of the Court of Appeals of the State of New York and decide this important constitutional issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF NEW YORK COURT OF APPEALS IN *MATTER OF HYNES v. TOMEI*, 92 N.Y.2d 613, __ N.E.2d __, __ N.Y.S.2d __ (1998)

In the Matter of CHARLES J. HYNES, as District Attorney of Kings County, Respondent, v ALBERT TOMEI, as Justice of the Supreme Court, et al., Appellants.

In the Matter of HOWARD R. RELIN, as Monroe County District Attorney, Respondent, v JOHN J. CONNELL, as Monroe County Court Judge, et al., Appellants, and DENNIS C. VACCO, Attorney-General of the State of New York, Intervenor-Respondent.

Argued October 14, 1998; decided December 22, 1998

* * *

POINTS OF COUNSEL

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* * *

Kevin M. Doyle, Capital Defender, New York City (*Susan H. Salomon* of counsel), for Michael Shane Hale, appellant in the first above-entitled action.

* * *

Charles J. Hynes, District Attorney of Kings County, Brooklyn (*Jonathan Frank* and *Keith Dolan* of counsel), for respondent in the first above-entitled action.

* * *

Appendix A

Dennis C. Vacco, Attorney-General, New York City (*Jill Gross Marks, Edward D. Saslaw* and *Michael Buskus* of counsel), for intervenor-respondent in the first above-entitled action.

* * *

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* * *

Donald M. Thompson, Rochester, for John J. Connell, appellant in the second above-entitled action.

* * *

Office of Capital Defender, Rochester (*Joseph T. Flood* and *William T. Easton* of counsel), for Angel Mateo, appellant in the second above-entitled action.

* * *

Howard R. Relin, District Attorney of Monroe County, Rochester (*Wendy Evans Lehmann* of counsel), for respondent in the second above-entitled action.

* * *

Dennis C. Vacco, Attorney-General, New York City (*Jill Gross Marks, Edward D. Saslaw* and *Michael Buskus* of

counsel), for intervenor-respondent in the second above-entitled action.

* * *

William J. Fitzpatrick, District Attorney of Onondaga County, Syracuse, *Richard A. Brown, District Attorney* of Queens County, Kew Gardens (*Gary Fidel* and *Linda Cantoni* of counsel), and *Bruce Seeliger* for New York State District Attorneys Association, *amicus curiae* in the first and second above-entitled actions.

* * *

OPINION OF THE COURT

Chief Judge KAYE.

Thirty years ago, the United States Supreme Court struck down the death penalty provision of the Federal Kidnaping Act (18 USC § 1201 [a]), which allowed a defendant to be sentenced to death only after a jury trial. The Supreme Court invalidated the provision because, by needlessly encouraging guilty pleas and jury waivers to avoid death sentences, it impermissibly burdened defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial (*United States v Jackson*, 390 US 570). Despite the passage of three decades, a plethora of decisions involving the death penalty and a sea change in plea bargaining, the Supreme Court has never overruled *Jackson*, which binds this Court. Indeed, every other death penalty State has fit its capital murder plea-bargaining procedures within the rationale of *Jackson*.

Appendix A

Three years ago, the New York State Legislature enacted a capital punishment statute that — like the Federal Kidnaping Act — allows a defendant to be sentenced to death only after a jury trial (L 1995, ch 1). Bench trials are not permitted in capital cases (*see*, NY Const, art I, § 2), and the statute bars imposition of a death sentence upon a guilty plea (*see*, CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]; 220.60 [2] [a]). The New York law thus explicitly provides two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial.[1] Defendants before us now challenge the plea provisions of the New York statute as violative of their Fifth and Sixth Amendment rights, relying on *Jackson*.

Both trial courts held the plea provisions facially unconstitutional under *Jackson* (*People v Hale*, 173 Misc 2d 140; *People v Mateo*, 175 Misc 2d 192). In separate declaratory judgment actions, the Appellate Division of the Second and Fourth Departments subsequently declared the provisions constitutional (*Matter of Hynes v Tomei*, 237 AD2d 52; *Matter of Relin v Connell*, 251 AD2d __, 1998 NY Slip Op 05487). We are convinced that *Jackson* compels the contrary result, and therefore reverse the Appellate Division orders and declare CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) unconstitutional. CPL 220.60 (2) (a), in the absence of the other two challenged provisions, is constitutional. Because the unconstitutional provisions are severable, the remainder of the statute is also unaffected by our ruling.

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1. Significantly, of the 39 death penalty jurisdictions in the United States, only the New York statute provides for such a difference in maximum punishments.

Appendix A

I.

The Federal Kidnaping Act considered in *Jackson* provided:

> "Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnaped * * * and held for ransom * * * or otherwise * * * shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

Because the Act authorized the death penalty only on the recommendation of a jury, while a defendant convicted of the same offense on a guilty plea or by a Judge escaped the threat of capital punishment, the Supreme Court concluded that the Act "needlessly" encouraged guilty pleas and jury waivers (*United States v Jackson*, *supra*, at 583; *see also*, *Pope v United States*, 392 US 651 [death sentence imposed under the Federal Bank Robbery Act (18 USC § 2113 [e]) vacated for the same reason]). The Court acknowledged that restricting the death penalty to cases in which a jury recommends it is a legitimate goal, and that such a restriction would likely decrease the frequency of capital punishment. However, the Court concluded these considerations did not save the Act from constitutional infirmity. While the Act's chilling effect on a defendant's exercise of the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial may have been incidental,

the effect was also "unnecessary and therefore excessive," since Congress could have achieved its goals by allowing juries to sentence defendants to the full range of punishments regardless of how guilt was determined (*id.*, at 582-583).

Shortly after *Jackson*, this Court invalidated two provisions of the former Code of Criminal Procedure that required waiver of a jury trial in order to receive the benefit of youthful offender treatment (*see*, *People v Michael A. C.*, 27 NY2d 79). Although respondents who refused to waive a jury trial were not subject to the death penalty, they were exposed to longer prison sentences than those prosecuted as youthful offenders. Drawing a parallel to *Jackson*, this Court held that "a procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, may not be sustained" (*id.*, at 86).[2]

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2. Respondents' reliance on *People v Sher* (24 NY2d 454, *mot to amend remittitur granted* 24 NY2d 1031, *cert denied* 396 US 837), a case decided before *Michael A. C.*, is misplaced. Defendant in *Sher* was not subject to the death penalty at the time of his appeal. On June 1, 1965, Governor Rockefeller announced that he would grant executive clemency to all death row inmates, such as Sher, who would not be subject to capital punishment under the revised death penalty statute, and commute their sentences to life imprisonment (*see*, *People v Sher*, *supra*, 24 NY2d, at 456, n, citing press release of June 1, 1965 by Governor Rockefeller at the time of approval of L 1965, ch 1030, § 125.30). Thus, Sher was subject to the same maximum sentence after a jury trial — life imprisonment — as he would have been had he pleaded guilty.

Appendix A

II

New York's death penalty statute authorizes a District Attorney to file a notice of intent to seek the death penalty against a defendant charged with murder in the first degree (*see*, Penal Law § 125.27; CPL 250.40). Upon conviction by a jury, a capital defendant faces a separate sentencing proceeding before a jury to determine whether the penalty imposed will be death or life imprisonment without parole (*see*, CPL 400.27). The statute affords a defendant the opportunity to ensure a maximum sentence of life without parole by pleading guilty pursuant to the following provisions:

> "A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole" (CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]).

> "A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment pursuant to subdivision three or four

> but subject to the limitation in subdivision five of section 220.10" (CPL 220.60 [2] [a]).

For all other crimes in New York only one top sentence is prescribed by statute.

Thus, like the invalidated Federal Kidnaping Act provision, New York's death penalty statute explicitly provides for the imposition of the death penalty only upon a jury verdict. As a result, under the New York statute, only those defendants who exercise the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial put themselves at risk of death. Nevertheless, respondents argue that the New York statute is distinguishable from the Federal Kidnaping Act in several ways. We conclude that the distinctions are without a constitutionally cognizable difference.

First, under the challenged New York provisions, a defendant can plead guilty to first degree murder, with agreement on the sentence to be imposed, only with the permission of the court and consent of the People (*see*, CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]). Because a defendant does not have unilateral control of the plea process, respondents argue, the statute never gives a defendant the choice between facing a jury and risking death on the one hand, and pleading guilty and avoiding death on the other. Therefore, respondents urge, the statute cannot "needlessly" encourage guilty pleas.

The Supreme Court, however, has found approval of a trial court and a prosecutor irrelevant to the *Jackson* analysis. Defendants prosecuted under the Federal Kidnaping Act could

not enter a plea of guilty as of right, since Federal Trial Judges had discretion to reject guilty pleas and jury trial waivers. This judicial involvement did not cure the constitutional problem: the statute's infirmity was not coercion of guilty pleas and jury waivers but needless encouragement of them (*United States v Jackson*, *supra*, at 583). Even though not every guilty plea to a charge under the Act was necessarily involuntary, the statute still impermissibly burdened defendants' constitutional rights (*id.*).[3]

The Supreme Court's subsequent application of *Jackson* further demonstrates that the People's involvement in the plea process fails to distinguish away *Jackson*'s prevailing rationale. Three years after *Jackson*, the Supreme Court declared unconstitutional North Carolina's capital pleading scheme, which required the approval of both the prosecutor and the court for a defendant to plead guilty. Under the challenged North Carolina statute, if a defendant charged with capital murder tendered a signed plea of guilty, the prosecutor, with the court's approval, could accept or reject the plea. If the plea were rejected, the trial would "proceed upon a plea of not guilty and the tender of the plea of guilty would have

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3. In the years following *Jackson*, the Supreme Court made clear that *Jackson* did not establish a new test for determining the validity of guilty pleas, but rather prohibited the Federal Kidnaping Act's impermissible burden on a defendant's exercise of constitutional rights. The Court also held that an otherwise valid plea is not necessarily involuntary if induced by the defendant's fear of the death penalty, and it refused to vacate guilty pleas simply because they were agreed to pursuant to statutes subsequently invalidated by *Jackson* (*see*, *Brady v United States*, 397 US 742; *North Carolina v Alford*, 400 US 25; *Parker v North Carolina*, 397 US 790).

no legal significance," exposing the defendant to the death penalty (*State v Atkinson*, 275 NC 288, 317, 167 SE2d 241, 259, *revd* 403 US 948). By contrast, if the plea were accepted, the effect would be a sentence of life imprisonment. In June 1971, *after* it had decided *Brady*, *Alford* and *Parker*, the Supreme Court reversed five death sentences imposed under this statute, in a summary disposition that, without explanation, simply cited *Jackson*:

"Judgments, insofar as they impose the death sentence, reversed, *United States* v. *Jackson*, 390 U.S. 570 (1968), *Pope* v. *United States*, 392 U.S. 651 (1968), and cases remanded for further proceedings" (*Atkinson v North Carolina*, 403 US 948; *Roseboro v North Carolina*, 403 US 948; *Hill v North Carolina*, 403 US 948; *Williams v North Carolina*, 403 US 948; *Sanders v North Carolina*, 403 US 948).

Thus, the need to obtain approval from the People and the court will not save plea provisions that otherwise violate *Jackson* (*see also*, *People v Michael A. C.*, 27 NY2d 79, *supra* [Code of Criminal Procedure provisions unconstitutional on *Jackson* grounds, even though court approval was required, with or without the recommendation of the Grand Jury or District Attorney]).[4]

Second, respondents argue that the challenged New York provisions are distinguishable from the Federal Kidnaping

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4. The Nevada Supreme Court, in striking Nevada's death penalty, also concluded that the approval of both the State and the court could not save an otherwise unconstitutional capital pleading scheme (*Spillers v State*, 84 Nev 23, 436 P2d 18, *overruled on other grounds Bean v State*, 86 Nev 80, 465 P2d 133).

Act because they merely codify permissible plea bargaining, which was not at issue in *Jackson*. Subsequent to *Jackson*, both the Supreme Court and this Court have acknowledged the legitimacy and desirability — indeed, the necessity — of plea bargaining (*see*, *Santobello v New York*, 404 US 257; *People v Selikoff*, 35 NY2d 227, *cert denied* 419 US 1122). Plea bargaining serves important functions for both prosecutors and defendants, such as individualized justice, leniency and economy (*State v Forcella*, 52 NJ 263, 245 A2d 181, *revd in part sub nom. Funicello v New Jersey*, 403 US 948). A State clearly may encourage guilty pleas by offering benefits to defendants in return for a guilty plea (*Corbitt v New Jersey*, 439 US 212, 219). Furthermore, plea bargaining becomes no less lawful or desirable when it is codified in statutory form (*see*, *id.*, at 224, n 14).

While plea bargaining is permissible, the Supreme Court in *Jackson* prohibited statutes that "needlessly" encourage guilty pleas, which are not constitutionally protected, by impermissibly burdening constitutional rights. Given the availability of alternatives that do not impermissibly burden defendants' constitutional rights, the plea provisions of the statute before us "cannot be justified by [an] ostensible purpose" such as the facilitation of plea bargaining (*United States v Jackson*, *supra*, at 582-583).

Respondents rely heavily on *Corbitt*, in which the Supreme Court held that it is constitutionally permissible to offer a defendant the possibility of escaping the most severe penalty by pleading guilty (*see*, *Corbitt v New Jersey*, *supra*, at 217-219). The New Jersey statute at issue in *Corbitt*, however, provided for the same maximum sentence — life

imprisonment — regardless of a defendant's plea. While a lesser sentence was permitted for those defendants who pleaded guilty, it was not guaranteed. Thus, the statute survived constitutional scrutiny because it did "not reserve the maximum punishment for murder for those who insist on a jury trial" (*id.*, at 217). This situation is readily distinguishable from the challenged New York provisions, which indeed prescribe a lesser agreed-upon sentence for those who plead guilty. In the words of *Jackson*, "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die" (*United States v Jackson*, *supra*, at 581; *see*, *Corbitt v New Jersey*, *supra*, at 217).[5]

Finally, respondents point to the bifurcated capital trial procedure in New York, by which a jury that finds a defendant guilty determines the sentence in a separate proceeding (*see*, CPL 400.27). By contrast, a defendant prosecuted under the Federal Kidnaping Act faced a unitary trial. Respondents suggest that under the bifurcated scheme, a defendant may

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5. While the Supreme Court has never overruled *Jackson*, it has not since *Corbitt* (decided in the quite different world of 1978) made reference to *Jackson*'s "needless" encouragement of guilty pleas in any majority opinion. As discussed below, however, the *Jackson* rationale continues to have controlling significance in the State courts. Several State courts during the past two decades have explicitly relied on *Jackson* in declaring provisions of their States' death penalty statutes unconstitutional on this ground, most recently New Hampshire in 1991 (*see*, *State v Johnson*, 134 NH 570, 595 A2d 498).

have an opportunity to agree to a sentence after the guilt phase of the trial, and thus after exercising the rights to maintain innocence and to have a jury determine guilt.

This does not alleviate the *Jackson* problem, however, because bifurcation does not eliminate the statutory framework that allows the possibility of death only after a jury trial. Capital defendants under the New York statute who are awaiting trial and are offered a plea are still faced with the choice *Jackson* declared unconstitutional: exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death. Furthermore, as respondents forcefully assert in trying to distinguish the challenged provisions from the Federal Kidnaping Act, a prosecutor is not required to accept a defendant's guilty plea. In fact, a prosecutor may be less willing to forego pursuit of the death penalty after a defendant's guilt has been established beyond a reasonable doubt. Thus, before deciding whether to proceed to trial, a defendant cannot know whether a deal on the sentence to be imposed will be available after a guilty verdict and before sentencing, and bifurcation does not eliminate the "chilling effect" on a defendant's constitutional rights to maintain innocence and demand a jury trial (*United States v Jackson*, *supra*, at 582).

In sum, respondents' attempts to distinguish New York's death penalty statute from the death penalty invalidated by the Supreme Court in *Jackson* fail. We recognize that New York's death penalty statute carries a strong presumption of constitutionality, as do all statutes (*see*, *People v Davis*, 43 NY2d 17, 30, *cert denied* 435 US 998, *rearg dismissed* 61 NY2d 670). However, the New York provisions are

unconstitutional for the same reason as the Federal Kidnaping Act: by statutory mandate, the death penalty hangs over only those who exercise their constitutional rights to maintain innocence and demand a jury trial. Thus, *Jackson* compels us to invalidate these provisions, just as it has compelled other State high courts to invalidate their capital plea provisions with the same constitutional infirmity (*see, e.g., State v Johnson*, 134 NH 570, 595 A2d 498 [1991], *supra; Commonwealth v Colon-Cruz*, 393 Mass 150, 470 NE2d 116 [1984]; *State v Frampton*, 95 Wash 2d 469, 627 P2d 922 [1981]; *State v Funicello*, 60 NJ 60, 286 A2d 55 [1972], *cert denied sub nom. New Jersey v Presha*, 408 US 942; *see also, Spillers v State*, 84 Nev 23, 436 P2d 18 [1968], *supra* [decided prior to the Supreme Court's decision in *Jackson*]).

By contrast, the death penalty statutes of States that have rejected a *Jackson* challenge, with one exception, provide for the possibility of a death sentence upon a guilty plea (*see, e.g., State v Mann*, 1996 WL 465764, 1996 Tenn Crim App LEXIS 508, *affd* 959 SW2d 503, *cert denied* __ U.S. __, 118 S Ct 2376; *Conger v Warden*, 89 Nev 263, 510 P2d 1359). The exception, Arkansas, avoided a *Jackson* problem because the Trial Judge, not the jury, made the final determination of whether the death penalty would be imposed, and because guilty pleas were permitted only after the prosecutor waived the death penalty (*see, e.g., Ruiz v State*, 275 Ark 410, 630 SW2d 44, *cert denied* 459 US 882).

III.

The question remains whether the entire death penalty statute must be invalidated, as defendants urge, or whether

the challenged provisions may be severed, leaving the statute otherwise operational. The answer depends on whether "the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether" (*People ex rel. Alpha Portland Cement Co. v Knapp*, 230 NY 48, 60 [Cardozo, J.], *rearg denied* 231 NY 516, *cert denied sub nom. State Tax Commr. v People ex rel. Alpha Portland Cement Co.*, 256 US 702). If removing particular provisions while leaving the remainder intact would result in a law the Legislature would not have intended, the entire statute must be stricken (*see, e.g., Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation*, 75 NY2d 88, 94).

In arguing that the death penalty itself should be stricken, defendants seek support from *Jackson*, in which the Supreme Court struck the death penalty from the Federal Kidnaping Act. In that statute, it was the death penalty provision itself, which was added two years after enactment of the original statute, that caused the constitutional infirmity. When enacted in 1932, the Federal Kidnaping Act did not provide for capital punishment; it merely defined the Federal crime of kidnaping and set the punishment as imprisonment for a term of years, to be decided by the trial court (*see*, 47 US Stat 326). Regardless of how a defendant was convicted under the original Act, the potential penalties were the same.

The Act was amended in 1934, however, to change the penalty structure, providing for the imposition of the death penalty only on a jury recommendation, but a prison term otherwise (*see*, 48 US Stat 781). It was the addition of the death penalty in this manner, which resulted in different levels

of punishment depending on whether defendants exercised their constitutional rights, that rendered the statute unconstitutional. Therefore, it was only through excision of the Act's death penalty clause that the constitutional infirmity could be cured. The result was the same sentencing system as the one contained in the original Act — those convicted would be sentenced by the court to imprisonment for a term of years. At the same time, by removing only the death penalty clause, the Court was able to preserve the purpose of the Act — to make interstate kidnaping a Federal crime.

In contrast to the Federal Kidnaping Act, it is clear from the face of the statute before us that the very purpose of the Legislature and Governor in enacting the statute was to provide for capital punishment in New York. The statute's severability clause indicates that the lawmakers would not have wanted the entire statute to fail if the particular provisions regarding pleas were declared unconstitutional:

> "If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, part or provision thereof" (L 1995, ch 1, § 37).

Nor is invalidation of the death penalty necessary to obviate the *Jackson* problem: excision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by *Jackson*, since without those provisions there

is only one maximum penalty for first degree murder. Furthermore, the plea provisions are discrete, and by no means vital to the remainder of the statute. Their removal would not affect the classification of capital offenses, or the conduct of the trial or penalty phase of capital cases.

Finally, while CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) relate exclusively to pleas in first degree murder cases and "needlessly" encourage guilty pleas in violation of *Jackson*, CPL 220.60 (2) (a) is not limited to first degree murder cases,[6] nor does it, in the absence of CPL 220.10 (5) (e), violate *Jackson*. Therefore, only CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) must be stricken.[7] Under the resulting statute, a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending.

We realize this result will reduce the flexibility of both prosecutors and defendants who wish to plea bargain in capital

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6. By its terms, CPL 220.60 (2) (a) allows defendants who have pleaded not guilty to any indictment to withdraw the plea before a verdict, subject to certain limitations, including the limitations of CPL 220.10 (5). Thus, CPL 220.60 (2) (a) affects many cases unrelated to first degree murder.

7. While there is nothing objectionable in the portion of the two unconstitutional provisions that merely allows a defendant to plead guilty to first degree murder with the permission of the court and consent of the People, saving this portion of the provisions would not eliminate the *Jackson* problem. Since by statute only a jury can impose a death sentence and there is no procedure for impaneling a jury to sentence a defendant after a guilty plea (*see*, CPL 400.27), defendants could still avoid the possibility of death only by pleading guilty.

cases. Indeed, our reversal in these cases may well have an ironic twist in that capital defendants will have fewer opportunities to avoid the possibility of the death penalty. We are also aware that the Supreme Court has not revisited *Jackson* and its progeny in 20 years, and that these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment. The fact remains, however, that although the Supreme Court itself may revisit its interpretation of Federal constitutional provisions, State courts are bound under the Federal Constitution to follow controlling Supreme Court precedent, and *Jackson* compels the result here.

While reducing the flexibility of plea bargaining in capital cases, excision of the unconstitutional provisions does not prevent pleas of guilty to first degree murder when no notice of intent to seek the death penalty is pending, since defendants in that situation face the same maximum sentence regardless of how they are convicted. Nor does the resulting statute prevent a defendant from pleading guilty to another offense not punishable by death, even when a notice of intent to seek the death penalty is pending, since nothing in *Jackson* prohibits imposing different penalties for different crimes. As the Supreme Court made clear in upholding the plea of a defendant charged with first degree murder who pleaded guilty to second degree murder, a State "may prohibit the practice of accepting pleas to lesser included offenses under any circumstances," but "this is not the mandate of the Fourteenth Amendment and the Bill of Rights" (*North Carolina v Alford*, 400 US, at 39). (*See also*, *State v Johnson*, 134 NH 570, 575, 595 A2d 498, 501, *supra* ["It is well settled

that a statute cannot permit a defendant who insists upon a jury trial and is convicted of capital murder to be sentenced to death, while allowing a defendant who pleads guilty to *the same crime* to escape the possibility of such a sentence" (emphasis supplied)].) Thus, while a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending, plea bargaining to lesser offenses even when a notice of intent is pending, or to first degree murder in the absence of a notice of intent, remains unaffected.

Given our conclusion under the Federal Constitution, we do not reach appellants' arguments under the New York State Constitution. We agree with the Appellate Division that appellants' procedural contentions in *Matter of Relin* are without merit.

Accordingly, in each case, the order of the Appellate Division should be reversed, without costs, and judgment granted declaring that CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) are unconstitutional and are deemed severed and stricken.

Judges BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY concur.

In each case: Order reversed, etc.

APPENDIX B — DECISION OF APPELLATE DIVISION, SECOND DEPARTMENT IN *MATTER OF HYNES v. TOMEI*, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dep't 1997)

In the Matter of CHARLES J. HYNES, as District Attorney of Kings County, Petitioner, v ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, et al., Respondents.

Second Department, December 22, 1997

* * *

APPEARANCES OF COUNSEL

Charles J. Hynes, District Attorney of Kings County, Brooklyn (*Deborah Stevens Modica, Keith Dolan, Jonathan Frank, Howard Getzler, Jacqueline Linares, Philip Semprevivo* and *Marie-Claude Wrenn* of counsel), petitioner *pro se*.

Hancock & Estabrook, L. L. P., Syracuse (*Stewart F. Hancock, Jr.*, of counsel), for Albert Tomei, respondent.

Capital Defender's Office, New York City (*Kelley Sharkey, John Youngblood* and *Sonya Zoghlin* of counsel), for Michael Shane Hale, respondent.

Christopher Dunn, Norman Siegel and *Arthur N. Eisenberg*, New York City, for New York Civil Liberties Union, *amicus curiae*.

Appendix B

Richard A. Brown, District Attorney of Queens County, Kew Gardens (*Gary Fidel, Linda Cantoni, Bruce Seeliger* and *Kathleen B. Hogan* of counsel), for New York State District Attorneys' Association, *amicus curiae*.

OPINION OF THE COURT

MANGANO, P.J.

In New York, the death sentence may be imposed upon a defendant charged with murder in the first degree only after successive, unanimous jury verdicts are rendered on the issues of guilt and punishment. Various provisions of New York's Criminal Procedure Law (hereinafter CPL) enable a defendant so charged to avoid any possibility of a death sentence by entering into a plea bargain agreement with the People. The question to be answered in this proceeding is whether these plea bargain provisions unconstitutionally penalize a capital defendant's right to a jury trial. We hold that this question must be answered in the negative and that the challenged provisions, CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a), are constitutional.

I

The respondent Michael Shane Hale was charged under Kings County indictment No. 8776/96 with the crimes of murder in the first degree (three counts), murder in the second degree (four counts), robbery in the first degree, kidnapping in the first degree, and kidnapping in the second degree. These charges arose out of the murder of Stefan Tanner on October 14, 1995. Subsequent to Hale's arraignment on the

indictment, the People timely filed a "notice of intent to seek the death penalty" (hereinafter the notice of intent), should Hale be convicted after a jury trial of the crime of murder in the first degree (CPL 250.40, 400.27).

Thereafter, Hale moved, *inter alia,* for an order declaring that CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a) (hereinafter the plea bargain provisions) are unconstitutional on their face. As characterized by the respondent Albert Tomei, a Justice of the Supreme Court, Hale argued that the plea bargain provisions, which enable a defendant charged with the capital crime of murder in the first degree to avoid any possibility of a death sentence by entering into a plea bargain agreement with the People, "effectively penalize[d] his right to a jury trial", by exposing him to the risk of death only when he exercised that right (*People v Hale,* 173 Misc 2d 140, 178).

By order entered July 2, 1997, Justice Tomei granted Hale's motion and, in reliance on the 1968 decision of the United States Supreme Court in *United States v Jackson* (390 US 570), held that the plea bargain provisions were unconstitutional in that they did "not conform to the requirements of the Fifth and Sixth Amendments to the United States Constitution, and corresponding provisions of the New York Constitution" (173 Misc 2d, *supra,* at 185).

The People moved to reargue Justice Tomei's order. On July 18, 1997, while the motion to reargue was *sub judice,* Hale and the People reached a plea bargain agreement based on discussions that had been ongoing during the pendency of the criminal action. The plea bargain agreement provided that

Hale would plead guilty, with the People's consent, to murder in the second degree, kidnapping in the second degree, and robbery in the first degree, in exchange for a sentence of 50 years to life imprisonment.

By order entered July 24, 1997, Justice Tomei denied the People's motion to reargue the prior motion which resulted in the order entered July 2, 1997. On that same date, Justice Tomei advised both Hale and the People that, in accordance with his orders, he would not accept their plea bargain agreement unless the People first withdrew their notice of intent.[1]

On August 5, 1997, the People commenced this proceeding pursuant to CPLR article 78 seeking to prohibit Justice Tomei from enforcing so much of his orders as "declared unconstitutional Criminal Procedure Law §§ 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) * * * or, in the alternative, [for] a judgment * * * declaring Criminal Procedure Law §§ 220.10 (5) (e), 220.30 (3) (b)

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1. CPL 250.40 (4) provides that "A notice of intent to seek the death penalty may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the defendant. Once withdrawn the notice of intent to seek the death penalty may not be refiled". The People refused Justice Tomei's suggestion that they withdraw the notice of intent, since they were of the view that once the notice of intent was withdrawn, the defendant would inevitably choose to withdraw from the plea bargain negotiations and proceed to trial where he would no longer be subject to the possibility of the death sentence. The People have advised this Court that defendants in two other capital cases (*see, People v Whitehurst,* 167 Misc 2d 383; *People v Hodges,* 172 Misc 2d 112) pleaded guilty with the People's consent after the People had filed their notice of intent.

(vii), and 220.60 (2) (a) to be constitutional and valid in all respects".

II

It is well settled that "[b]ecause of its extraordinary nature, prohibition is available only where there is a clear legal right, and then only when a court — in cases where judicial authority is challenged — acts or threatens to act without jurisdiction or in excess of its authorized powers" (*Matter of Holtzman v Goldman,* 71 NY2d 564, 569; *see also, Matter of Kaplan v Tomei,* 224 AD2d 530). Furthermore, prohibition is not a proper method to determine the constitutionality of a statute (*see, e.g., Matter of Gold v Gartenstein,* 54 NY2d 627). Accordingly, so much of the People's petition as sought a writ of prohibition is denied. However, the People's alternative request, i.e., that the proceeding be converted into an action for a declaratory judgment, requires separate scrutiny.

The remedy of a declaratory judgment " 'is available in cases "where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved" ' " (*Matter of Morgenthau v Erlbaum,* 59 NY2d 143, 150, *cert denied* 464 US 993, quoting *New York Foreign Trade Zone Operators v State Liq. Auth.,* 285 NY 272, 276, quoting *Dun & Bradstreet v City of New York,* 276 NY 198, 206). Further, a declaratory judgment may be used to attack a criminal court's interlocutory ruling when "the * * * ruling [has] an obvious effect extending far beyond the matter pending before it so that it is likely that the issue will arise again with the same result in other cases" (*Matter*

of Morgenthau v Erlbaum, supra, at 152). Pursuant to these guidelines and the circumstances presented in the instant proceeding, we deem it appropriate to grant the People's request to convert the proceeding into an action for a declaratory judgment (*see,* CPLR 103 [c]; *see also, Matter of Morgenthau v Roberts,* 65 NY2d 749; *Matter of Penny Lane/ E. Hampton v County of Suffolk,* 191 AD2d 19).

III

With respect to the merits of the instant action, we commence our analysis with the well-settled axiom that "State statutes under scrutiny carry with them a strong presumption of constitutionality, that they will be stricken as unconstitutional only as a last resort and that courts may not substitute their judgment for that of the Legislature as to the wisdom and expediency of the legislation" (*People v Davis,* 43 NY2d 17, 30, *cert denied* 435 US 998).

We now turn to the plea bargain provisions which were declared unconstitutional by Justice Tomei. These provisions were adopted by chapter 1 of the Laws of 1995 and became effective September 1, 1995.

CPL 220.10 (5) (e), governing kinds of pleas, and CPL 220.30 (3) (b) (vii), governing pleas to part of an indictment or covering other indictments, are worded identically, stating: "A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either

life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole".

CPL 220.60 (2), governing change of a plea states in relevant part: "A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment pursuant to subdivision three or four but subject to the limitation in subdivision five of section 220.10".

In making a declaration of unconstitutionality, Justice Tomei relied primarily on the United States Supreme Court's decision in *United States v Jackson* (390 US 570, *supra* [hereinafter *Jackson*]). In *Jackson* the defendants moved to dismiss a count of an indictment charging them with a violation of the Federal Kidnaping Act (18 USC § 1201 [a]). That statute provided for the possibility of the death penalty on the recommendation of the jury but "sets forth no procedure for imposing the death penalty upon a defendant who * * * pleads guilty" (*United States v Jackson, supra,* at 571). Moreover, in *Jackson* the consent of the prosecutor was not required in order to enter a guilty plea to the kidnapping charge. The District Court held that the death penalty provision of the statute was unconstitutional because it made the risk of death the price for asserting the right to a jury trial. In affirming the District Court, a majority of the United States Supreme Court (Justices White and Black dissenting) held that the "inevitable effect" of the statute was "to discourage assertion of the Fifth Amendment right not to

plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial", and that the "evil in the federal statute is * * * that it needlessly encourages [guilty pleas]" (*United States v Jackson, supra,* at 581, 583 [emphasis omitted]).

The Federal Kidnaping Act invalidated in *Jackson* is distinguishable from New York's death penalty statute in two crucial respects. In *Jackson* the defendant faced a unitary trial where the jury could recommend a death sentence and was not required to balance aggravating and mitigating factors.[2] In contrast to the Federal Kidnaping Act, the death penalty statute in New York provides for a bifurcated trial where the defendant's guilt, and the sentence to be imposed, are determined separately by the jury. At the guilt phase, the defendant retains all of his or her constitutional protections, e.g., he or she is not compelled to take the witness stand, and the People must prove guilt beyond a reasonable doubt. At the sentencing phase, the defendant has the opportunity to present "any evidence", including his or her own testimony, "relevant to any mitigating factor" set forth in the statute (CPL 400.27 [6], [9]).[3] Of equal, if not greater significance, is that

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2. This defect was instrumental in the Supreme Court's subsequent decision striking down similar death penalty statutes throughout the country (*see, Furman v Georgia,* 408 US 238).

3. At the sentencing proceeding, the jury may impose, by a unanimous verdict, a sentence of death or a sentence of life imprisonment without parole. The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that "aggravating * * * factors substantially outweigh the

(Cont'd)

the defendant in *Jackson* had complete control of the plea process, i.e., he could plead guilty as of right to the capital kidnapping charge, and thus could avoid the death penalty by his own unilateral action, an option which the United States Supreme Court recognized would be difficult to resist. In contrast, the plea bargain provisions at bar prohibit a capital defendant from pleading guilty, as of right, to murder in the first degree;[4] rather, they merely grant the People the discretion to enter into a plea bargain agreement with the capital defendant so as to remove the case from the capital punishment track.

It must be further emphasized that the practice of plea bargaining was not at issue in *Jackson*; indeed, it was nearly three years later that the United States Supreme Court stated that plea bargaining was a "highly desirable" and "essential component of the administration of justice" which "[p]roperly administered, is to be encouraged" (*Santobello v New York*, 404 US 257, 260, 261; *see also, Bordenkircher v Hayes*, 434 US 357, 361-362). Moreover, in several subsequent decisions, the United States Supreme Court has made it clear that its holding in *Jackson* does not have the broad application ascribed to it by Justice Tomei.

(Cont'd)

mitigating factor or factors established" (CPL 400.27 [11] [a]). If the jury fails to reach a unanimous agreement with respect to the sentence, the court "will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life" (CPL 400.27 [10]).

4. A noncapital defendant in New York may plead guilty to the entire indictment as of right (CPL 220.10 [2]).

Appendix B

In *Brady v United States* (397 US 742), the defendant entered a guilty plea to the Federal Kidnaping Act (18 USC § 1201 [a]) and was sentenced in 1959. Thereafter, the defendant sought postjudgment relief, claiming, in reliance on *Jackson*, that the death penalty provision of the kidnapping statute had needlessly encouraged his guilty plea and the waiver of his right to trial because his plea had been motivated by a fear of the death penalty. In rejecting the defendant's argument, Justice White, speaking for a majority of the Court, stated that the defendant had "read far too much into the *Jackson* opinion" and that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty" (*Brady v United States, supra,* at 746, 755). In his dissent in the companion appeal of *Parker v North Carolina* (397 US 790), Justice Brennan criticized the majority for failing to distinguish between "the legislative imposition of a markedly more severe penalty if a defendant asserts his right to a jury trial and a concomitant legislative promise of leniency if he pleads guilty" and the "very different * * * give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power" (*Parker v North Carolina, supra,* at 809).

In *North Carolina v Alford* (400 US 25), the defendant was indicted for first degree murder, a capital offense. The defendant subsequently entered a guilty plea, with the prosecutor's consent, to second degree murder, which was not punishable by death. The United States Supreme Court rejected the defendant's argument that the plea was invalid under the *Jackson* holding: "We held in *Brady* v. *United States,* 397 U. S. 742 * * * that a plea of guilty which would

not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment" (*North Carolina v Alford, supra,* at 31).

Again, in *Corbitt v New Jersey* (439 US 212), the United States Supreme Court stated: "Decisions after *Jackson* sustained practices that, although encouraging guilty pleas, were not 'needless' * * * Subsequent decisions reaffirmed the permissibility of plea bargaining even though 'every such circumstance has a discouraging effect on the defendant's assertion of his trial rights,' because the 'imposition of these difficult choices [is the] inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas' " (*Corbitt v New Jersey, supra,* at 219, n 9, quoting *Chaffin v Stynchcombe,* 412 US 17, 31). Finally, the United States Supreme Court has noted that "a prosecutor can * * * offer a plea bargain * * * in any particular case [and] a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice' " (*McCleskey v Kemp,* 481 US 279, 312, quoting *Gregg v Georgia,* 428 US 153, 200, n 50).

Consistent with the principles set forth by the United States Supreme Court concerning plea bargaining in capital cases, two lower courts in this State have declared the plea bargain provisions to be constitutional (*see, People v McIntosh,* 173 Misc 2d 727 [Dutchess County Ct, Aug. 4, 1997]; *People v Chinn,* NYLJ, Nov. 19, 1996, at 31, col 3 [Onondaga County Ct]). In addition, appellate courts in sister States have upheld similar statutory provisions (*see, e.g., Ruiz*

v State, 275 Ark 410, 630 SW2d 44, *cert denied* 459 US 882; *Conger v Warden*, 89 Nev 263, 510 P2d 1359; *Tennessee v Mann*, 1996 WL 465764 [Tenn Crim App]). The Supreme Court of Arkansas held in *Ruiz v State* (*supra*, 275 Ark, at 414, 630 SW2d, at 47) that: "[I]t is well settled that a plea bargain is not invalid per se merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty".

The precedents relied on by Justice Tomei are factually inapposite, i.e., they do not involve statutes which enable capital defendants to plea bargain with the People for a lesser penalty (*see, e.g., People v Michael A. C.*, 27 NY2d 79; *State v Johnson*, 134 NH 570, 595 A2d 498; *Commonwealth v Colon-Cruz*, 393 Mass 150, 470 NE2d 116; *State v Frampton*, 95 Wash 2d 469, 627 P2d 922; *State v Funicello*, 60 NJ 60, 286 A2d 55, *cert denied sub nom. New Jersey v Presha*, 408 US 942; *Spillers v State*, 84 Nev 23, 436 P2d 18).

Finally, counsel for Justice Tomei urges that even if "this Court should conclude * * * that [Justice] Tomei's determination is not compelled by *Jackson*, under the Federal Constitution, then it could — and * * * should — uphold his determination under the New York State Constitution".

We respectfully decline to so hold. This Court has previously observed that "any inquiry into the existence of enhanced protection by the State Constitution * * * [is better left] to the Court of Appeals * * * as the State's policy-making tribunal" (*People v Keta*, 165 AD2d 172, 178, *revd on other*

grounds sub nom. People v Scott, 79 NY2d 474).[5] In any event, the Court of Appeals has given its unequivocal approval to the practice of plea bargaining. In *People v Seaberg* (74 NY2d 1), the Court of Appeals stated: "Plea bargaining is now established as a vital part of our criminal justice system. Indeed, as we recognized years ago, the volume of criminal prosecutions is so great that if full trials were required in each case New York's law enforcement system would collapse (*see, People v Selikoff,* 35 NY2d 227, 233, *cert denied* 419 US 1122). Certainly nothing has happened since then to cause us to change that observation. The judicial acceptance of plea bargaining, however, rests upon broader policy considerations. In addition to permitting a substantial conservation of prosecutorial and judicial resources, it provides a means where, by mutual concessions, the parties may obtain a prompt resolution of criminal proceedings with all the benefits that enure from final disposition. The plea bargain, or negotiated sentence, enables the parties to avoid the delay and uncertainties of trial and appeal and permits swift and certain punishment of law violators with sentences tailored to the circumstances of the case at hand (*see generally, Santobello v New York,* 404 US 257, 261; *People v Selikoff,* 35 NY2d 227, 233-235, *supra*). The pleading process necessarily includes the surrender of many guaranteed rights but when there is no constitutional or statutory mandate and no public policy prohibiting it, an accused may waive any right which he or she enjoys (*Schick*

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5. Although this Court's decision in *People v Keta (supra)* was reversed by the Court of Appeals in *People v Scott (supra)*, the reversal was on the merits. The Court of Appeals did not comment on this Court's observation concerning the respective roles of the Appellate Division and the Court of Appeals.

v United States, 195 US 65, 72)" (*People v Seaberg, supra,* at 7).

In light of the foregoing, the motion of the respondent Michael Shane Hale, *inter alia,* to grant the petition in part and deny it in part, or alternatively, to dismiss the proceeding, is denied, the proceeding is converted into an action for a declaratory judgment, and CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a) are declared to be constitutional. Accordingly the determination of the respondent Tomei to the contrary (*People v Hale,* 173 Misc 2d 140, *supra*) should not be followed.

O'BRIEN, RITTER, THOMPSON and LUCIANO, JJ., concur.

Ordered that the proceeding is converted into an action for a judgment declaring that CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a) are constitutional; and it is further,

Adjudged that CPL 220.10 (5) (e); 220.30 (3) (b) (vii); and 220.60 (2) (a) are declared to be constitutional; and it is further,

Ordered that the motion by the respondent Michael Shane Hale, *inter alia,* to grant the petition in part and deny it in part, or alternatively, to dismiss the proceeding, is denied.

APPENDIX C — DECISION OF APPELLATE DIVISION, FOURTH DEPARTMENT IN *MATTER OF RELIN v. CONNELL*, __ A.D.2d __, 674 N.Y.S.2d 192 (4th Dep't 1998)

Matter of Honorable Howard R. RELIN, as Monroe County District Attorney, Petitioner,

v.

Honorable John J. CONNELL, as Monroe County Court Judge, Angel Mateo, Respondents,

and

Honorable Dennis C. Vacco, Attorney General of New York State, Intervenor.

Supreme Court, Appellate Division, Fourth Department.

June 10, 1998.

* * *

Monroe County District Attorney (Wendy Lehmann, of counsel), Rochester, for petitioner.

John J. Connell by Donald Thompson, Rochester, for respondent Connell.

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Capital Defender's Office by Joseph Flood, Rochester, for respondent Mateo.

New York Civil Liberties Union by Christopher Dunn, New York City, for amicus curiae.

Richard A. Brown, District Attorney of Queens County, Kew Gardens, for New York State District Attorneys' Association, amicus curiae.

Before LAWTON, J.P., and HAYES, PIGOTT, BOEHM and FALLON, JJ.

MEMORANDUM:

The People commenced this original CPLR article 78 proceeding seeking, *inter alia,* to prohibit respondent the Honorable John J. Connell from enforcing an order declaring CPL 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) unconstitutional. We deny that part of the petition seeking a writ of prohibition (*see generally, Matter of Gold v. Gartenstein,* 54 N.Y.2d 627, 442 N.Y.S.2d 504, 425 N.E.2d 892; *Matter of Van Wie v. Kirk,* __ A.D.2d __, __ N.Y.S.2d __ [decided herewith]). Because this issue is of critical importance and is likely to recur, we grant that part of the petition seeking, in the alternative, to convert the proceeding to a declaratory judgment action (*see,* CPLR 103[c]; *Matter of Morgenthau v. Roberts,* 65 N.Y.2d 749, 751, 492 N.Y.S.2d 21, 481 N.E.2d 561; *Matter of Morgenthau v. Erlbaum,* 59 N.Y.2d 143, 151-152, 464 N.Y.S.2d 392, 451 N.E.2d 150, *cert. denied* 464 U.S. 993, 104 S.Ct. 486, 78 L.Ed.2d 682), and we grant judgment declaring those sections constitutional.

Appendix C

The People contend that the provisions of New York's death penalty statute governing kinds of pleas (CPL 220.10[5][e]), those governing pleas to part of an indictment or covering other indictments (CPL 220.30[3][b][vii]) and those governing the change of a plea (CPL 220.60[2][a]) do not violate respondent Angel Mateo's right to a jury trial and therefore are constitutional. We agree. Those sections do not grant a defendant the unilateral right to plead guilty and thereby avoid the death penalty, and thus they do not "needlessly encourage[ ]" guilty pleas in violation of defendant's right to demand a jury trial (*United States v. Jackson,* 390 U.S. 570, 583, 88 S.Ct. 1209, 20 L.Ed.2d 138; *see, Matter of Hynes v. Tomei,* 237 A.D.2d 52, 666 N.Y.S.2d 687; *see also, Corbitt v. New Jersey,* 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466; *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162; *Brady v. United States,* 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747). Contrary to Mateo's contention, those provisions do not violate the N.Y. Constitution (*see generally, People v. Seaberg,* 74 N.Y.2d 1, 7, 543 N.Y.S.2d 968, 541 N.E.2d 1022). Indeed, they provide a defendant charged with a capital crime with an opportunity to plead guilty.

We have reviewed respondents' remaining contentions and conclude that they are without merit.

Consequently, we grant the petition in part, convert the proceeding to an action for a declaratory judgment and grant judgment in favor of petitioner declaring that CPL 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) are constitutional.

Petition unanimously granted in part without costs and judgment granted.

APPENDIX D — APPLICABLE PORTION OF DECISION OF JUSTICE ALBERT TOMEI IN *PEOPLE v. MICHAEL SHANE HALE*, 173 Misc. 2d 140, 178-87, 661 N.Y.S.2d 457, 478-84 (N.Y. Sup. Ct., Kings County 1997)

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v MICHAEL SHANE HALE, Defendant.

Supreme Court, Kings County, June 6, 1997

* * *

APPEARANCES OF COUNSEL

Kevin M. Doyle, Capital Defender, New York City (*Kelley J. Sharkey, John M. Youngblood* and *Sonya A. Zoghlin* of counsel), for defendant. *Charles J. Hynes, District Attorney* of Kings County, Brooklyn (*Keith Dolan, Deborah Stevens Modica* and *Kyle C. Reeves* of counsel), for plaintiff.

OPINION OF THE COURT

ALBERT TOMEI, J.

In an omnibus motion filed on January 21, 1997, the defendant requests numerous orders and hearings. The People filed papers in opposition, and the defendant filed a reply. Oral argument was heard on the motions. The defendant's motions are resolved as follows:

* * *

Appendix D

IV. MOTION CHALLENGING GUILTY PLEA AND "NO BENCH TRIAL" PROVISIONS OF THE CRIMINAL PROCEDURE LAW

The defendant claims that provisions of the Criminal Procedure Law which prohibit him from pleading guilty without the consent of the District Attorney and the permission of the court, and prohibit him from waiving his right to a jury trial, violate various New York and Federal constitutional provisions. In opposition, the People argue not only that the contested statutes comply with constitutional mandates, but that the defendant does not have standing to raise a challenge to the statutory limits on guilty pleas in capital cases, since there is nothing in the record to suggest that the defendant has offered to enter a plea of guilty.[19]

Standing

The People assert that the defendant cannot challenge the provisions regulating guilty pleas in capital cases because he has not offered to plead guilty, and therefore has not suffered any injury in fact. In the court's opinion, this argument is untenable. As discussed in detail below, the defendant does not assert merely that he has been denied the right to plead guilty, but that the plea provisions effectively penalize his right to a jury trial. Assuming arguendo that the plea provisions are defective, the defendant is, in fact, harmed, because his right to a jury trial is impaired by plea provisions that penalize that right. Therefore, even if the defendant were

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19. The court is aware that there have been plea discussions in this case.

to abjure a plea and exercise his right to a jury trial, he would have standing to raise this claim. (*See, Robtoy v Kincheloe,* 871 F2d 1478, 1480 [9th Cir 1989].)

CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a)

CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) permit a defendant charged with murder in the first degree to plead guilty only when the sentence to be imposed pursuant to the plea is one authorized for murder in the first degree, other than death.[20] In addition, the plea must be with the permission of the court and the consent of the People. (*See,* CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]; 220.60 [2] [a].)

In *United States v Jackson* (390 US 570 [1968]), the Supreme Court of the United States struck down the death penalty provision of the Federal Kidnaping Act (commonly known as the Lindbergh Law) which provided, in pertinent part, that: " 'Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnaped * * * and held for ransom * * * or otherwise * * * shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.' " (*United States v Jackson,* 390 US, *supra,* at 570-571, quoting 18 USC § 1201 [former (a)].) The Court interpreted the Act to authorize the imposition of the death penalty only after a jury

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20. The permissible nondeath sentences for a conviction of murder in the first degree are an indeterminate term of imprisonment of a minimum of 20 to 25 years to a maximum of life, or life without parole. (*See,* Penal Law §§ 60.06, 70.00 [3] [a] [i].)

trial, but not following conviction upon a guilty plea or a nonjury trial. (*United States v Jackson,* 390 US, at 571.)

Concluding that the Act's death penalty provision was unconstitutional, the Court remarked that "the defendant's assertion of the right to [a] jury trial may cost him his life, for the federal statute authorizes the jury — and only the jury — to return a verdict of death." (*See, United States v Jackson,* 390 US 570, 572, *supra.*) The Court held that the statute was unconstitutional because it "needlessly penalize[d] the assertion of a constitutional right." (*Supra,* at 583, citing *Griffin v California,* 380 US 609.) According to the Court, the statute needlessly encouraged guilty pleas and effectively penalized the right to a jury trial by exposing the defendant to the risk of death only when he exercised his constitutional rights.

The evil of the Act was that it "tend[ed] to discourage defendants from insisting upon their innocence and demanding trial by jury". (*United States v Jackson,* 390 US, *supra,* at 583.) "[T]he defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." (*United States v Jackson,* 390 US, at 581.)[21]

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21. In 1971, in single-paragraph orders that did not elaborate the basis for the decisions — except to say that, "Judgments, insofar as they impose the death sentence, reversed and cases remanded" — the Supreme Court reversed seven death penalty convictions arising out of New Jersey, North Carolina, and South Carolina, citing *United States v Jackson (supra)* among other cases. (*See,* 403 US 948 [1971].)

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It is apparent that New York's death penalty statute, likewise, provides for the imposition of the death penalty only upon recommendation of the jury; the provisions governing pleas in capital cases in New York expressly forbid the imposition of the death penalty upon a plea of guilty (*see,* CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]; 220.60 [2] [a]), and a defendant may not waive a jury trial where the crime charged may be punishable by death. (*See,* NY Const, art I, § 2.)[22] Only if the defendant insists upon exercising his Sixth

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22. It may be argued that article I, § 2 can be interpreted to prohibit guilty pleas in capital cases. The provision states, in pertinent part, that "[a] jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death". (NY Const, art I, § 2.) Since a defendant necessarily waives his right to a jury trial by entering a guilty plea, it is logical to conclude that article I, § 2 forbids guilty pleas in capital cases. This construction would eliminate the concerns voiced in *Jackson (supra),* because defendants would not be forced to choose between relinquishing their constitutional rights and risking death. All death-eligible defendants would be required to have their cases adjudicated in jury trials, an apparently permissible result under *Jackson.* (*See, United States v Jackson,* 390 US, at 584-585 [Court held that requiring all capital defendants to go to trial would not be unconstitutional, but was not intended by Congress when it enacted Federal Kidnaping Act].) However, this interpretation appears to be foreclosed by cases which hold that article I, § 2 guarantees only that if a defendant wishes to exercise his right to a trial, he is entitled to be tried before a jury. However, if a defendant pleads guilty, choosing not to seek a trial, article I, § 2 is not implicated. (*See, e.g., People v Hardy,* 53 AD2d 647, 648 [2d Dept 1976] [holding that article I, § 2 is not applicable to guilty plea by which defendant elects not to litigate guilt, but instead gives defendant who elects to stand trial the right to obtain trial before court without a jury].) Thus, there appears to be no constitutional impediment to a defendant's pleading guilty to a death-eligible offense. Neither the People nor the defendant argue otherwise.

Amendment right to a jury trial and his Fifth Amendment privilege against self-incrimination does he risk death. Therefore, unless New York's law may be distinguished from the Act in question in *Jackson (supra),* this court is bound to find the plea provisions to be unconstitutional. (*See, People v Black,* 34 AD2d 999, *affd without opn* 30 NY2d 593 [1972] [in obiter dicta, citing *Jackson,* Appellate Division stated that where the death sentence may be imposed, when appropriate, only upon a jury verdict of guilty (Penal Law former § 125.30), under such statutory scheme death penalty is unconstitutional since it needlessly encourages taking of guilty pleas]; *compare, Lyons v Howard,* 434 F2d 632, 633 [6th Cir 1970] [finding Kentucky's death penalty statute distinguishable from that in *Jackson* because capital defendant in Kentucky subjects himself to death penalty whether he is tried before a jury, to the court, or pleads guilty].)

The People point out that, by contrast with the Federal law in question in *Jackson (supra),* New York's statute, along with the New York Constitution, does not permit death-eligible defendants to waive the right to a jury trial. (*See,* NY Const, art I, § 2; CPL 320.10 [1].) Thus, the People argue, because New York does not permit death-eligible defendants to waive their right to a jury trial, capital defendants are not needlessly encouraged to abandon that right; indeed, it is impossible for them to do so.

Not only are the People wrong is asserting that New York's statute does not require defendants, at least incidentally, to waive their right to a jury trial to avoid the risk of death (*see, People v Lee,* 58 NY2d 491, 494 [1983]

[guilty plea waives, *inter alia,* right to jury trial]), but New York's scheme actually results in greater prejudice to the defendant than that in *Jackson (supra).* Under the Federal Kidnaping Act, a defendant could avoid the risk of death in two ways: he could either plead guilty, thereby relinquishing his Sixth Amendment right to a jury trial and his Fifth Amendment privilege against self-incrimination, or he could request a bench trial, thereby waiving only his right to a trial by jury. (*See, United States v Jackson,* 390 US, *supra,* at 571.) By contrast, under New York law, a defendant may avoid the risk of death only by pleading guilty, waiving both rights: his right to a jury trial; and his privilege against self-incrimination, as well.

In any event, *Jackson* makes clear that two rights are violated by death penalty schemes which provide for the imposition of death only after a jury trial: the Sixth Amendment right to a jury trial; and the Fifth Amendment right not to plead guilty. (*United States v Jackson,* 390 US, *supra,* at 581, citing *Herman v Claudy,* 350 US 116.) Therefore, even assuming that the statute's fault did not implicate the right to a jury trial, it would still infringe upon the defendant's Fifth Amendment rights.

Next, the People argue that *Jackson (supra)* is distinguishable because, under the New York law, "an open plea of guilty is not possible". According to the People, because the defendant must secure the permission of the court and the consent of the People before entering a guilty plea, "a defendant cannot heedlessly tender a plea of guilty to the entire indictment." However, in *Jackson,* the defendant did not have the unbridled right to enter a guilty plea, either.

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Justice White, in a dissent joined by Justice Black, argued that any defect in the Federal Kidnaping Act could be addressed by "making it clear that pleas of guilty and waivers of jury trial should be carefully examined before they are accepted, in order to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury." (*United States v Jackson,* 390 US, *supra,* at 592 [White, J., dissenting].) Rejecting the dissent's solution, the Court noted that, "[t]he power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision". (*United States v Jackson,* 390 US, at 583.) The Court made it clear that it was the needless encouragement of guilty pleas together with the penalty imposed upon defendants who exercised their right to a jury trial which rendered the statute infirm.

While it is true that in *Jackson (supra),* the consent of the prosecutor was not required to enter a guilty plea, this is a distinction without a difference. (*Cf., Spillers v State,* 84 Nev 23, 436 P2d 18, 21-23 [1968] [striking down death penalty statute that provided for imposition of death only after jury trial, and permitted defendant to waive jury with permission of court and consent of prosecutor].) If, as the *Jackson* Court proclaimed, judicial scrutiny of pleas is no remedy for the constitutional infirmity, the problem is not relieved by requiring the further consent of the prosecutor, who, after all, as the defendant's adversary, cannot be said to have the defendant's best interests first and foremost in mind. It is to the prosecutor's advantage to use the threat of death upon a conviction by jury to induce defendants to accept guilty pleas to avoid that risk. Indeed, one might argue that

the prosecutor is most likely to consent to guilty pleas not in cases where guilt is certain and the likelihood of a death verdict is high, but in cases where proof of guilt is wanting. It is in those cases that one is most likely to find the "defendant ingenuous enough to seek a jury acquittal" (*United States v Jackson*, 390 US, at 581), but who is chilled in exercising his rights by the threat of death upon a jury verdict.

Nor can one argue that New York's plea provisions are sustainable because they codify permissible plea bargaining. It is true, in principle, that a capital defendant may bargain to plead guilty to a crime that is not punishable by death, thereby avoiding the risk of capital punishment. (*See, Brady v United States*, 397 US 742 [1970].) What is forbidden is a scheme, like New York's, in which the possibility of death only arises from the defendant's exercise of his right to a jury trial. (*Cf., Corbitt v New Jersey*, 439 US 212, 226 [1978] [Stewart, J., concurring in the judgment] [unlike Act at issue in *Jackson (supra)*, New Jersey statute did not provide for death, and convicted defendant could be sentenced to maximum penalty of life imprisonment whether he pleads guilty or goes to trial].)

To avoid this problem, the overwhelming majority of death penalty jurisdictions, including the Federal system, provide that if a defendant pleads guilty to capital murder, his sentence is to be determined in a penalty proceeding after which death or a term of imprisonment may be imposed. (*See, e.g.*, Fla Stat Annot, tit XLVII, § 921.141; 720 Ill Comp Stat Annot 5/9-1; Ohio Rules Crim Pro, rule 11 (C) (3); 42 Pa Cons Stat Annot § 9711; 18 USC § 3593 [b].) In Arkansas, defendants are not permitted to waive a jury trial unless the

State first revokes its intent to seek the death penalty, and thus the *Jackson* problem is avoided. (*See,* Ark Rules Crim Pro rule 31.4; Ark Stat Annot § 41-1302 [1], now Ark Code Annot § 5-4-603; *see also, Ruiz v State,* 275 Ark 410, 630 SW2d 44, 47 [1982].) The court has surveyed the laws of every other death penalty State, and it appears that no other jurisdiction permits guilty pleas to capital murder, yet provides for the imposition of death only, after the defendant contests his guilt before a jury, as New York does. By removing the disparity in potential punishment between defendants who request a jury trial and those who plead guilty, other States have addressed the concerns of *Jackson (supra).* No doubt, these States enacted those provisions for that very purpose, and in some instances, in response to opinions of their highest courts striking down death penalty provisions pursuant to *Jackson.* (*See, State v Johnson,* 134 NH 570, 595 A2d 498 [1991]; *Commonwealth v Colon-Cruz,* 393 Mass 150, 470 NE2d 116 [1984];[23] *State v Frampton,* 95 Wash 2d 469, 627 P2d 922 [1981]; *State v Funicello,* 60 NJ 60, 286 A2d 55 [1972]; *Spillers v State,* 84 Nev 23, 436 P2d 18 [1968], *supra.*)

Indeed, the Supreme Court created a road map for States to follow in complying with the mandate of *Jackson (supra).* The *Jackson* Court noted that, "[i]n some States, for example, the choice between life imprisonment and capital punishment is left to a jury in *every* case — regardless of how the defendant's guilt has been determined." (*United States v Jackson,* 390 US, at 582 [emphasis in original].) The Court concluded that "[g]iven the availability of this and other

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23. Massachusetts did not reinstate the death penalty.

alternatives, it is clear that the selective death penalty provision of the Federal Kidnaping Act cannot be justified." (*United States v Jackson,* 390 US, at 582-583.) It does not suffice to claim that, because the intention of the Legislature may have been to mitigate the severity of the death penalty by permitting nondeath pleas to capital crimes, the statute passes constitutional muster. As the Supreme Court held in *Jackson*, "[w]hatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." (*United States v Jackson,* 390 US, at 582.)

While New York courts in the past have not had occasion to apply *Jackson (supra)* to a death penalty statute,[24] its import has not been lost on the Court of Appeals. In *People v Michael A. C.* (27 NY2d 79, 86 [1970]), the Court of Appeals struck down the provision of the former Code of Criminal Procedure which allowed for youthful offender treatment for certain defendants only if they waived their right to a jury trial. (*See, People v Michael A. C.*, 27 NY2d, at 86.) The Court held that "although any defendant, including a youthful offender, is free to consent to a trial without a jury if, in fact and reality, he prefers to be so tried — and knowingly waives his constitutional right — this does not mean that a State may demand that such a consent be given as an absolute

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24. In *People v Black* (34 AD2d 999, *affd without opn* 30 NY2d 593 [1972], *supra*) the Appellate Division, in obiter dicta, cited *Jackson (supra)* for the proposition that where the death penalty may be imposed, when appropriate, only upon a jury verdict of guilty (*see,* Penal Law former § 125.30), under such a statutory scheme the death penalty is unconstitutional since it needlessly encourages the taking of guilty pleas.

precondition to affording him the benefits of youthful offender treatment." (*People v Michael A. C.*, 27 NY2d, at 86, citing *United States v Jackson; Nieves v United States*, 280 F Supp 994.) It noted that, "[t]he defendant in the case before us would not, it is true, have been subject to the death penalty had he refused to consent to a nonjury trial but he certainly would have been exposed to a considerably longer period of imprisonment than he could receive if prosecuted as a youthful offender." (*People v Michael A. C.*, 27 NY2d, 79, 86 [1970].) "[A] procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, may not be sustained." (*People v Michael A. C.*, 27 NY2d, at 86.)

Needless to say, if it infringes upon a noncapital defendant's rights to condition youthful offender treatment upon jury waiver, a fortiori, it is impermissible, in a case involving capital punishment, which is "unique in its severity and irrevocability" (*Gregg v Georgia*, 428 US 153, 187, *supra*), to do the same. (*Cf., Corbitt v New Jersey*, 439 US, *supra*, at 217 [distinguishing *Jackson (supra)* by finding that pressures to forego trial and plead guilty are different in capital case because of unique quality of capital punishment].)

Lastly, the People attempt to distinguish *Jackson (supra)* by claiming that "the federal statute operated as a mandatory death penalty scheme." It is difficult to understand how this alleged distinction leads to different result. Insofar as the holding of *Jackson* is concerned, it is of no consequence that one statute mandated death upon conviction, while the other allows the possibility of the imposition of death in the jury's discretion after a separate penalty phase. Both statutes share

the same defect: penalizing defendants by subjecting them to the risk of death only upon their exercise of the right to jury trial.

In any event, the People's reading of the Federal Kidnaping Act is plainly wrong. The Act provided for a sentence of death "*if * * * the jury shall so recommend*" (emphasis supplied), or "imprisonment for any term of years or for life, if the death penalty is not imposed." (18 USC § 1201 [former (a)].) In the face of this plain language, the People's claim that the Act mandated death upon conviction strains credulity, to say the least.

In sum, all attempts by the People to distinguish New York's statute from the death penalty provision at issue in *Jackson (supra)* fall short.

"Courts of first instance should not exercise transcendent power of declaring an act of the Legislature unconstitutional except in rare cases involving life and liberty, and where the invalidity of the act is apparent on its face." (McKinney's Cons Laws of NY, Book 1, Statutes § 150 [a], at 312-313.) This is such an instance. Plainly, life and liberty are at stake in this case. Moreover, as much as the court may wish to effect the intent of the Legislature and harmonize the plea provisions with constitutional requirements, the court does not fulfill its obligations by turning a blind eye to the compelling evidence of their unconstitutionality. "In the field of federal constitutional law, the decisions of the United States Supreme Court are of course binding upon all state courts." (*State v Forcella,* 52 NJ 263, 294, 245 A2d 181, 198 [1968] [Jacobs and Hall, JJ., dissenting].) "Our clear responsibility

is to apply those decisions with due regard for their tenor, principles and goals in analogous situations with the aim of determining a matter as we conscientiously believe that Court would if the case were before it." (*Supra*, 52 NJ, at 294-295, 245 A2d, at 198.) "No Judge must ever hesitate to act when a statute's constitutional invalidity is apparent beyond a reasonable doubt." (*People v Velez*, 88 Misc 2d 378, 395 [NY County 1976] [striking down mandatory death penalty statute].)

In the face of overwhelming evidence — the *Jackson* decision *(supra)* itself; the decisions of several States' highest courts applying *Jackson* to strike down their statutes, which were substantially similar to New York's; the *People v Michael A. C.* decision *(supra)*, which applies the *Jackson* rationale to a non-capital case; and the fact that apparently no other jurisdiction has a statutory scheme that permits guilty pleas but allows for the imposition of death only after jury trial — the court is led ineluctably to the conclusion that CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) do not conform to the requirements of the Fifth and Sixth Amendments to the United States Constitution, and corresponding provisions of the New York Constitution.

The court reaches this decision for the sole reason that any other result is foreclosed by the holding of *United States v Jackson (supra)*. However, the court notes in passing that finding these provisions to be unconstitutional at this juncture, rather than "rubber-stamping" them so that the Court of Appeals may subsequently pass upon their constitutionality years later, serves not only the interests of fundamental fairness, but judicial economy, as well. It makes no sense to

permit convictions under these suspect provisions, only to have those cases reversed upon appeal years later, burdening the courts and the parties with retrials.

In this vein, mindful that the law-making function is left to the Legislature alone, the court respectfully invites the Legislature to consider whether to enact plea provisions to conform with the practices of other States that have constructed statutes to comply with *Jackson (supra)*.

Severability

New York's death penalty statute contains a saving clause, which provides that: "If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, part or provision thereof." (L 1995, ch 1, § 37.) If a statute contains a saving clause, there arises a presumption that the Legislature intended for only the portion of the statute which is deemed to be defective to be stricken. Only if the court concludes that the provision in question cannot be severed from the rest of the statute, or that, notwithstanding the saving clause, the Legislature did not intend for the statute to remain in effect without the particular provision, should the court strike the statute as a whole. As Judge Cardozo stated: "The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded,

or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." (*People ex rel. Alpha Portland Cement v Knapp,* 230 NY 48, 60.)

Having determined that the plea provisions are unconstitutional, the court must determine whether to strike the death penalty statute as a whole, or whether it will suffice to invalidate only the defective provisions, leaving the remainder of the law in place. The court concludes that the plea provisions may be severed from the remainder of the law, and that there is no reason to conclude that the Legislature did not intend for the statute to remain in effect absent those provisions.

There is no question that CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) constitute discrete provisions pertaining only to capital cases. As such, they may be severed without doing injury to the remainder of the Criminal Procedure Law. Nor would severance lead to impermissible results in capital cases.

Since the right to plead guilty is a creature of statute, and is not mandated constitutionally (*see, Corbitt v New Jersey,* 439 US, *supra,* at 222-223; *cf., People v Melo,* 160 AD2d 600 [1st Dept 1990]), the court may strike the contested statutes, thereby leaving no provision for guilty pleas in death-eligible cases, and thus curing the constitutional defect. The effect of severing the provisions will be to prohibit pleas in cases in which a notice of intent to seek the death penalty

has been filed and is in effect. In cases in which the crime of murder in the first degree is charged and no such notice has been filed, or where the notice has been revoked by the District Attorney, a defendant may plead guilty pursuant to CPL 220.10 (5) (d) (i), which provides for pleas where the charge is a class A felony.

Therefore, CPL 220.10 (5) (e), 220.30 (3) (b) (vii), and 220.60 (2) (a) shall be deemed stricken from the death penalty statute. The defendant's motion in all other respects is denied.

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APPENDIX E — APPLICABLE PORTION OF DECISION OF JUDGE JOHN J. CONNELL IN *PEOPLE v. ANGEL MATEO*, (Unreported) (N.Y. Co. Ct., Monroe County, Aug. 25, 1997)

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MOTION DECLARING CPL §§220.10 (5) (E) 220.30 (3) (B) (VII) AND 220.60 (2) UNCONSTITUTIONAL (AM-18)

MOTION FOR AN ORDER DECLARING CPL §320.10 AND ARTICLE I, §2, OF THE NEW YORK STATE CONSTITUTION UNCONSTITUTIONAL (AM-19)

The defendant seeks an Order declaring those sections of the Criminal Procedure Law prohibiting guilty pleas without the consent of the People and the court unconstitutional as they apply to the crime of Murder in the First Degree.

Criminal Procedure law §220.10 (5) (e) provides in pertinent part that "[A] defendant may not enter a guilty plea to the crime of murder in the first degree as defined in Section 125.27 [without] permission of the court and the consent of the people". The defendant argues that the guilty plea provisions of CPL §220 impermissibly penalize his exercise of the right to trial as protected by the 6th Amendment of the United States Constitution and Article I, Section 2 of the New York State Constitution because the defendant can only be sentenced to death if he elects to go to trial.

Initially, the People argue that this motion should be denied as premature because the defendant has not shown

any actual or threatened injury to a protected right, i.e. he has not offered to plead guilty. Since the statutory scheme under consideration denies the defendant an unfettered right to enter a guilty plea, his offer to so plead is immaterial and he has standing to challenge the statute (*People v. Hale*, __ Misc2d __ [Supreme Ct., Kings County, 1997]; *People v. McIntosh*, __ Misc2d __ [Dutchess County, 1997]).

The issue, then, is whether New York's statutory prohibition against open guilty pleas runs afoul of *United States v. Jackson* (390 US 570). In *Jackson* the United States Supreme Court ruled a statute under consideration unconstitutional in that a defendant, under the statute as written, could only avail himself of his 6th Amendment right to a jury trial and 5th Amendment right against self incrimination by risking death. The People have attempted to differentiate the statute under consideration in *Jackson* from these provisions of the New York statute because the statute requires the consent of the Court *and* the District Attorney before a plea of guilty to Murder in the First Degree may be entered and a sentence other than death imposed. As Justice Tomei wrote *Hale*, "this is a distinction without a difference". The consent of the Court is always required before a plea will be accepted. The addition of requiring the consent of the District Attorney before allowing a guilty plea does not ameliorate the problem and, in fact, may exacerbate it, and gives no assurance that a plea will not be coerced. One can foresee situations where prosecutors would only consent to pleas where evidence of guilt is somewhat weak. Thus, it would seem that only defendants who are "ingenuous enough" to seek their acquittal risk death (*United States v. Jackson*, supra at 581).

Appendix E

It has been argues that the statutory scheme struck down in Jackson is distinguishable from the statutory scheme in New York in that a defendant in New York who is charged with first degree murder may only insulate himself from death through plea negotiations with the District Attorney, either before Notice of Intent is filed or thereafter, and that the process of bargaining between a prosecutor and a defendant on plea or sentence, although somewhat coercive, had not been held to be unconstitutional (*Bordenkircher v. Hayes*, 424 US 357). Bargaining life and liberty, however, are different. Generally in a plea bargaining situation, a defendant may very well wish to gamble a number of years of his liberty in negotiating with the prosecutor and weigh the risks inherent in that process accordingly. However, the finality of death eliminates true negotiation because no longer is the same item being bargained.

The Court therefore finds that CPL §§220.10 (5) (e) 220.30 (3) (b) (vii) and 220.60 (2) are unconstitutional under the 5th and 6th Amendments of the United States Constitution an the corresponding provisions of the New York State Constitution.

The defense further proposes that should this Court declare, as it has done, that the guilty plea provisions of New York's death penalty statute are unconstitutional, that this Court strike the entire statute. This Court declines to do so and finds that the guilty plea sections of New York's death penalty statute, as set forth herein, can be stricken and that there is now no provision for the defendant to enter a plea of guilty in this death eligible case. Pleas of guilty pursuant to CPL §220.10 (5) (d) (I) remain an option in first degree

murder cases where no Notice of Intent to Seek the Death Penalty has been filed or has been withdrawn and sentencing will be conducted pursuant to CPL §400.27 (1).

The final aspect of this application (AM-19) is a request to declare both CPL §320.10 and Article I, §2, of the New York Constitution, which prohibits a capital defendant from waiving the right to a jury trial at the guilt phase of his trial, unconstitutional.

There is no constitutional right to a non-jury trial in New York and none is recognized at the federal constitutional level (New York Const, Art. I, §2 and *Singer v. United States*, 380 US 24, 34). Therefore, the defendant's motion on this issue is denied.

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